Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

SHELBY PAIGE HOLLAND, a minor,
by and through her next best friend and
parent Tessa Kay Overdorff, et al.,

Petitioners,

v.

ROBIN S. HARRINGTON, individually, and
in her official capacity as Undersheriff of
La Plata County, Colorado; et al.,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

An arrest warrant for misdemeanor charges of third degree assault and reckless endangerment was issued for petitioner Samuel Heflin, together with a search warrant for his residence that sought bloody clothes, a cowboy hat, Marlboro cigarettes, a ball cap and receipts.

The respondents decided to deploy a Special Weapons and Tactics ("SWAT") team to execute the warrants despite the facts that: the alleged crimes were misdemeanors; no weapons were brandished during the alleged assault; the respondents knew that Heflin had no criminal record; they admitted that they had no reason to believe that either Heflin or anyone else who lived at his house would physically resist arrest; they knew young children would be present; and the items listed in the search warrant could not be easily destroyed.

Whether, under the totality of the circumstance test set forth in *Graham v. Connor*, the decision to deploy a SWAT team to conduct a dynamic entry of Heflin's property and residence to execute the arrest and search warrants did not constitute excessive force as a matter of law.

LIST OF PARTIES BELOW

Petitioners

Shelby Paige Holland, a minor, by and through her next best friend and parent Tessa Kay Overdorff (n/k/a Tessa Kay Sliter); Marty Shane Holland, a minor, by and through his next friend and parent Tessa Kay Overdorff; Anthony Scott "Scotty" Holland; Kristy Denise Holland Dane; Randy Joe Holland; Tessa Kay Overdorff; Tonie Pauline Heflin; and Samuel Allen Heflin.

Respondents

Robin S. Harrington, individually, and in her official capacity as Undersheriff of La Plata County, Colorado; Duke Schirard, individually, and in his official capacity as Sheriff of La Plata County, Colorado; Kelly Davis, individually, and in his official capacity as a deputy sheriff of the La Plata County Sheriff's Department

In addition to the parties above, also a defendant in the proceedings below was the La Plata County Sheriff's Department. The interlocutory appeal that is the subject of this petition involves issues of qualified immunity. Thus, the La Plata County Sheriff's Department was not a party to the appeal.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the October 19, 2001 opinion and judgment of the U.S. Courts of Appeals for the Tenth Circuit in the above-captioned proceeding.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a), is reported at 268 F.3d 1179. The opinions of the district court (App., *infra*, 31a-53a; and 54a -56a) are unreported.

JURISDICTION

The court of appeals entered its judgment on October 19, 2001. The court of appeals entered an order denying timely petitions for rehearing *en banc* on November 28, 2001 (App., *infra*, 57a-58a). Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place be searched, the persons or things to be seized.

U.S. CONST. amend IV.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

U.S. CONST. amend XIV, sec. (1).

STATEMENT

1. Petitioners brought this Fourth Amendment excessive force claim following a SWAT team raid on their home to execute a misdemeanor arrest warrant and a related search warrant. The relevant facts are as follows.[1]

In the early morning hours of April 14, 1996, an altercation occurred outside of Virginia's Steakhouse, a restaurant and bar located in La Plata County, Colorado. The La Plata County Sheriff's Department investigated the incident, identified several suspects and subsequently issued arrest warrants for Sammy Heflin, Jack Marshall, Lester Erdman and Randall Dove.

On Tuesday, April 16, 1996, at approximately 5:40 p.m., more than 48 hours after the altercation at Virginia's, uniformed deputies of the La Plata County Sheriff's Department located, arrested and took into custody without incident suspects Randall Dove and Lester Erdman.

At approximately 8:00 p.m. on the evening of April 16, 1996, after the arrest of Dove and Erdman, Undersheriff Harrington obtained an arrest warrant for Sammy Heflin for Assault in the Third Degree, a class 1 misdemeanor, and Reckless Endangerment, a class 3 misdemeanor. The alleged

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[1] Because the case arise on respondents' motion for summary judgement, any disputed facts are presented in the light most favorable to the petitioners. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

victim, Tonya Edwards, suffered minor physical injuries during the alleged assault.

A search warrant was also issued for his property, residence and all outbuildings. The items that were the subject of the search warrant were: bloody clothing, a Cowboy hat, Marlboro cigarettes, a ball cap and receipts from establishments in the area of the incident.

According to respondent Sheriff Schirard, the main reason the SWAT team was deployed was because of the search warrant, not the arrest warrant. One of the reasons Schirard and respondent Lt. Davis gave for the using the SWAT team to make a "dynamic entry" was the urgency to collect evidence that Heflin might otherwise destroy. It is against La Plata County Sheriff Department policy to use dynamic entry "simply to preserve evidence that might be destroyed if a slower form of entry is used."

Before the SWAT team raid, James Cheverie, an Investigator for the Sheriff's Department, offered to take a uniformed officer to Sammy Heflin's residence to arrest him. Respondent Undersheriff Harrington rejected this request, telling Investigator Cheverie:

> No, I don't want you to go pick him up. We're going to use a SWAT team to go get the piece of shit, and he can't do that in my county.

Harrington stated to Investigator Cheverie that she was going to "teach this piece of shit a lesson."

Respondents Schirard, Harrington and Davis all participated in the decision to use the SWAT team to raid Sammy Heflin's home. Sheriff Schirard made the final decision to order the SWAT team to raid Sammy Heflin's home. At the time the respondents made the decision to deploy the SWAT team, they knew that young children would be present at the Heflin residence.

The SWAT team raided Heflin residence under the direct supervision of respondent Davis at approximately 8:30 p.m., when it was night. The SWAT team raiding party consisted of ten men, seven of whom where dressed in green camouflage clothing that included hoods over their heads such that only their eyes were visible, many of which were carrying automatic weapons, at least one with a laser sight.

According to the deposition testimony of Harrington and Davis, the purpose of the search warrant was to obtain physical evidence linking Sammy Heflin to the alleged assault. Sammy Heflin received severe burns from an explosion while working in the oil fields. These burns left visible scarring on Sammy Heflin's face. Schirard testified that as a result of these "significant" burns on his face, Sammy Heflin is "easily identifiable." According to Harrington, Sammy Heflin is "very disfigured." Davis described Sammy Heflin as being "severely scarred."

Before the SWAT team Raid, Harrington had spoken to: (1) Marilyn Zabueris, the manager of Virginia's, who identified Sammy Heflin by name and physical description, *i.e.*, severely burned on his face, as being present; (2) Jason Egger, who had previously lived with Sammy Heflin, and who identified Sammy Heflin as being present at the scene; and (3) Tonya Edwards, Sammy Heflin's alleged victim, who gave a physical description of Sammy Heflin, including the fact that he was scarred.

Harrington personally knew Sammy Heflin and knew that he smoked Marlboro cigarettes, a brand that investigators found at the scene of the alleged assault.

Before they decided to use the SWAT team to raid the Heflin residence, the respondents conducted a check of Sammy Heflin's criminal background and found that Sammy Heflin had no criminal record. The respondents also testified at deposition that they had no information that would lead them to believe that he would physically resist arrest. Schirard testified that he had no reason to believe that

Sammy Heflin had any type of illegal weapons. Before the SWAT team raid, there were no police reports or witness statements that indicated that firearms or other weapons were brandished during the altercation at Virginia's.

Before the SWAT team raid, Sheriff Schirard had several contacts with Sammy Heflin involving Sammy Heflin's stepchildren and other teenagers living under Sammy Heflin's care. According to Schirard, during those contacts Sammy Heflin was cooperative, never refused to come in and talk to Schirard and never lied to Schirard. According to Harrington, Sammy Heflin was polite in his dealings with her.

The respondents had no evidence that anyone living at the Heflin home was involved in the fight at Virginia's. After conducting an NCIC search, the only arrest records found related to persons the respondents suspected to be living at the Heflin home involved Tonie Heflin and Tessa Kay Overdorff for misdemeanor assaults where no weapons were involved. The respondents had no information that any other person who might be living at the Heflin home had ever resisted arrest or ever threatened a law enforcement officer.

The other suspect subject to an arrest warrant, Jim Marshall, was known by Harrington to live in Bayfield, Colorado and not at the Heflin home. From her interview with Jason Egger, whom she considered to be a reliable source as to who was living at the Heflin home, Harrington knew that the two other suspects known only as Mike and Bob, lived in Farmington, New Mexico and not at the Heflin residence.

2. The petitioners filed a complaint under 42 U.S.C. §§ 1983 and 1988 against the respondents and the La Plata County Sheriff's Department alleging that the decision to deploy the SWAT team to execute the warrants and the methods the SWAT team employed in the execution of the warrants constituted excessive force in violation of the

petitioners' Fourth and Fourteenth Amendment rights to be protected from unreasonable searches and seizures.[2]

The petitioners based their claim against the La Plata County Sheriff's Department on the theory of municipal liability emanating from the decision of Sheriff Schirard, the Department's final-decision maker, to deploy the SWAT team.

The respondents filed a motion for summary judgment asserting qualified immunity. The United States District Court for the District of Colorado, Chief Judge Babcock, *citing Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985), held that the constitutional standard for excessive force cases was well established before the SWAT team raid on the Heflin home. App at 42a. With respect to the decision to deploy the SWAT team, Judge Babcock found that "it is beyond dispute that the deployment of a SWAT team and, *a fortiori*, the decision to utilize a SWAT team implicates Fourth Amendment rights." *Id.*

In evaluating whether the force used in this case was excessive, Judge Babcock utilized the "objective reasonable" standard as set forth in *Graham v. Connor*, 490 U.S. 386, 396 (1989) (holding that an analysis of an excessive force claim "requires careful attention to the facts and circumstances of each particular case, including the severity of crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight"). App at 43a.

Judge Babcock, viewing the evidence in the light most favorable to the petitioners, as required under *Anderson v. Liberty Lobby, Inc., supra*, 477 U.S. at 252 and *Mitchell v. Forsyth*, 472 U.S. 511, 528-29 (1985), held that "there is a genuine dispute whether the decision to deploy the SWAT team was objectively reasonable. Consequently, I cannot say,

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[2] The protections against unreasonable searches and seizures guaranteed by the Fourth Amendment are enforceable against the state and local governments through the Fourteenth Amendment. *Colorado v. Bannister*, 449 U.S. 1, 2 (1980).

as a matter of law, that the decision to use the SWAT force was objectively reasonable." App. 48a.

Judge Babcock granted in part, and denied in part, respondent Davis' request for qualified immunity involving the deployment of the SWAT team. App. 45a –50a; 52a-53a. This gist of these rulings allowed the petitioners to continue to prosecute their claims against respondent Davis in connection with the alleged failure to "knock and announce" and with respect to pointing weapons at young children, including pointing a laser sighted weapon on the back of Shelby Holland, who was four years old at the time. Those decisions are not a subject of this appeal.

Judge Babcock also held that the petitioners failed to satisfy the showing necessary to establish municipal liability against the Sheriff's Department. App. 51-52a. However, by subsequent order, Judge Babcock reinstated the claims against the Sheriff's Department, based on his finding that Sheriff Schirard had final policy making authority, citing *Pembaur v. Cincinnati*, 475 U.S. 469, 481 (1986). App.55a-56a.

3. The court of appeals affirmed in part and reversed in part. The court of appeals followed this Court's directive in *Saucier v. Katz*, ___ U.S. ___, 121 S.Ct. 2151, 2156 (June 18, 2001), and asked the threshold question of whether the facts alleged, taken in the light most favorable to the petitioners, show that the officers' conduct violated a constitutional right. App 5a.

The court of appeals rebuffed the respondents' contention that none of the petitioners, other than Sammy Heflin, were "seized" within the meaning of the Fourth Amendment during the April 16 raid. App. 8a-9a. The court of appeals also recognized that "[t]he decision to deploy a SWAT team to execute a warrant necessarily involves the decision to make an overwhelming show of force – force far greater than that normally applied in police encounters with citizens." App. 12a

The court of appeals agreed with the district court and the petitioners that the decision to deploy "a SWAT team to make a 'dynamic entry' into a residence constitutes conduct 'immediately connected with the seizure' because it determines the degree of force initially to be applied in effectuating the seizure itself." App. 12a, citing *Garner*, 471 U.S. at 8 ("it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out").

To determine whether the deployment of the SWAT team in this case amounted to excessive force, the court of appeals cited to the test set forth in *Garner*, 471 U.S. at 8, which requires a court to "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." App 13a.

The court of appeals, quoting from the respondents' brief, listed various factors that the respondents claimed justified the deployment of the SWAT team to effectuate a dynamic entry. The respondents averred that the situation was potentially dangerous because of the presence of children, that Sammy Heflin had a history of violence, there may have been seven or eight adults residing on his ranch and there may have been firearms at his home. App 13a.

The court of appeals acknowledged that the facts were strongly in dispute, noting that Sammy Heflin had no criminal record, the respondents had no reason to believe that he would physically resist arrest and that Sammy Helfin had a history of cooperating with Schirard and Harrington when minors under his charge had legal trouble. App. 13a-14a.

Among the other reasons the respondents proffered to justify the SWAT team raid, the respondents represented to the court of appeals that one of the suspects involved in the altercation, Randall Dove, was suspected of being involved in a homicide and that a gun was brandished the night of the

altercation by one of the suspects. Neither of these justifications withstand scrutiny.

First, the respondents were aware that before they conducted the SWAT team raid, uniformed officers had arrested Mr. Dove without incident. Second, none of the police reports or witness statements mentioned that anyone displayed a gun during the night of the altercation and Harrington, the person who was the lead investigator, testified at her deposition that she had no knowledge of any weapons being brandished during the altercation or displayed that night at Virginia's.

Nonetheless, the court of appeals held that the petitioners failed to show that the decision to use the force associated with the deployment of a SWAT team to execute a dynamic entry under the facts of this case constituted excessive force. App. 14a. The court of appeals appears to have based its decision on the facts that the SWAT team did encounter a number of adults at the residence and outbuildings, legal firearms were found at the residence and there was no altercation during the raid. *Id.* Thus, under the court of appeals decision, law enforcement agencies operating in the Tenth Circuit are free to use SWAT team raids to execute misdemeanor arrest warrants at the homes of large, extended families who enjoy hunting and the protections accorded by the Second Amendment, even if they have no reason to believe that the residents will physically resist arrest.

Judge Henry filed a strong dissent. App. 28a –30a. Judge Henry began his opinion by declaring that "[t]he facts as we must construe them on summary judgment are, to understate, disquieting." App. 29a. After briefing describing the raid, Judge Henry asked and answered the pertinent question:

> The purpose of this armed intervention? To serve a search and arrest warrant for a misdemeanor charge. Incidentally, Sammy

> Heflin was later acquitted of these misdemeanor charges. What is wrong with this picture?

Id.

Judge Henry based his opinion that the majority should have affirmed the trial court's denial of the respondents' motion for summary judgment on qualified immunity grounds on several salient facts: (1) the alleged crime involved a misdemeanor; (2) Sammy Heflin had no criminal record; (3) Sammy Heflin had no history of violence known to the police; (4) the people who lived on Mr. Helfin's property had no history of violence with the police; (5) there was no evidence that the alleged assault involved any weapon; (6) the Sheriff's Department's own policy was not to use dynamic entry in order to preserve evidence; and (7) the evidence sought under the search warrant could not easily be destroyed. App. 28a 29a.

The court of appeals affirmed the district court's decision that the facts, taken in the light most favorable to the petitioners, show that the conduct of the SWAT team during the raid violated the petitioners' Fourth Amendment rights (App. 15a-20a) and also held that these rights were clearly established at the time of the raid. App.20a-24a. Accordingly, the court of appeals affirmed the denial of respondent Davis' motion for summary judgment on qualified immunity.

On November 28, 2001, the court of appeals denied the timely filed petitions of for rehearing of the petitioners and respondents. App. 57a-58a. This petition ensued.

REASONS FOR GRANTING THE PETITION

1. The Question Presented is Important.

This case presents the Court with an opportunity to emphasize to law enforcement agencies and personnel that the protections afforded by the Fourth Amendment are applicable to decisions to deploy SWAT teams, and that using SWAT teams for routine policing matters will constitute excessive force under factual situations such as the one at hand.

Placing constitutional limits on SWAT team deployments is essential because as the number of SWAT teams increases so does the chances that they will be improperly deployed, as in this case, to execute misdemeanor arrest warrants in full battle regalia against citizens who have no criminal history or propensity to resist arrest. As the majority opinion cogently recognized:

> SWAT officers no less than others – dressed in camouflage or not – must keep it clearly in mind that we are *not* at war with our own people.

App. 19a (emphasis in original).

The importance of this case amplified by the aftermath of the events of September 11, 2001 and the heightened need for homeland security. While SWAT teams are undeniably an indispensable weapon for local, state and federal law enforcement agencies facing dangerous situations, like any weapon, the use of SWAT teams is subject to abuse. As local, state and federal law enforcement agencies proceed to tackle the difficult task of homeland security in the wake of terrorists attacks on American soil and the constant threat of more such attacks, it is necessary to ensure that SWAT teams are properly deployed against real threats and not used to "teach [someone they consider to be 'an expletive' charged with a misdemeanor] a lesson"

Darly Gates, the erstwhile Chief of the Los Angeles Police Department, is considered to be responsible for developing the first SWAT team in the late 1960s after the Watts riot and an incident known as the Surry Street shootings in which three officers and a citizen were injured by a barricaded gunman who ambushed the police.[3] Since Gates started the LAPD's SWAT team program in the late 1960s when he was a patrol area commander with the LAPD, SWAT teams have proliferated. According to an academic study published in 1997, almost 90 percent of police departments surveyed in cities with a population over 50,000 had paramilitary units, as did 70% of the departments surveyed in communities with populations under 50,000.[4]

With the increase in the number and presence of SWAT teams throughout the country, in both large urban areas and more rural settings such as La Plata County Colorado, there is the natural phenomenon of "mission creep" in which SWAT teams, originally formed to confront dangerous situations, are utilized to engage in community policing activities. For example, a midwestern community of 75,000 sends out patrols dressed in tactical uniform in a military personnel carrier. According to the SWAT commander, the armored vehicle stops "suspicious vehicles and people. We stop anything that moves. We'll sometimes even surround suspicious homes and bring out the MP5s [machine gun pistols]."[5]

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[3] Note, *Treading the Thin Blue Line: Military Special-Operations Police SWAT Teams and the Constitution*, 9 Wm. & Mary Bill Rts. J. 673, 674 (2001), citing Daryl Gates, Chief, at 110 (1992).

[4] Weber, *Warrior Cops, The Ominous Growth of Paramilitarism in American Police Departments*, Cato Institute, Cato Briefing Paper No. 50 (Aug. 26, 1999), citing Kraska and Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, Social Problems 44 (1997): 5-6.

[5] Weber, *supra*, at 8, quoting Kraska and Kappeler at 10.

The city of Fresno, California sends its SWAT team, in full military gear, into the inner city looking for "minor violations" and do "jump-outs either on people on the street or automobiles. After we jump-out the second car provides periphery cover with an ostentatious display of weaponry. We're sending a clear message: if the shootings don't stop, we'll shoot someone."[6]

It is important to note that the petitioners are not suggesting that the Fourth Amendment precludes the use of SWAT teams for their traditional roles in executing high-risk warrants, hostage situations or situations involving barricaded individuals.[7] Rather, Petitioners are asking the Court to hear this case and reaffirm that using SWAT teams to effectuate misdemeanor warrants in low-risk situations may constitute excessive force.

In sum, the proliferation of SWAT teams has naturally lead to their abuse and overuse. The question presented is an important one because it affords the Court the opportunity to emphasize to law enforcement agencies that there are indeed constitutional limits to deploying these paramilitary units, thus ensuring that agencies properly limit their use of this valuable tool in their arsenal to truly dangerous situations. Unfortunately, the court of appeals decision places no such limit on SWAT team raids.

2. The Decision of the Tenth Circuit Conflicts with Ninth Circuit precedent

The court of appeals decision conflicts with *Alexander v. City and County of San Francisco*, 29 F.3d 1355 (9th Cir.1994), *cert. denied, sub nom., Lennon v. Alexander*, 513 U.S. 1083 (1995).

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[6] Quoted by Kraska and Kappeler at 10 (emphasis added).

[7] Research indicates that 75 percent of SWAT team missions involve high-risk warrants while 17 percent involve hostage situations or barricade individuals. *Treading the Thin Blue Line, supra* at n. 3, citing William Booth, *Exploding Number of SWATs Sets off Arlams*, Wash. Post, June 17, 1997, at A1.

Alexander involved a barricade situation in which an individual, Henry Quade, refused to allow a health department official to inspect his home. A municipal court judge issued a forcible entry warrant for an inspection of the home for code regulations. Quade again refused to allow the inspection and threatened "to get my gun and use it." The officer requested reinforcements and the police department deployed its tactical team. The tactical team broke down the door with a battering ram, and five officers entered with guns drawn. A fire fight started and Quade was killed.

The plaintiff, the executor of Quade's estate, alleged, among other things, that the commander of the tactical team was liable because he directed the tactical team to use excessive force when entering the home, while conceding that once the Quade pointed his gun at the officers that the force that they used was reasonable. 29 F.3d at 1366.

The Ninth Circuit held that the "reasonableness of the force" used by the police was in contention and, therefore, it denied the officers' motion for summary judgment on the qualified immunity issue. *Id.* at 1367. The court held if the jury found that the police entered the home to arrest Quade, then they "may" conclude that storming the house was "commensurate with the need (arresting a man who had threatened to shoot anyone who came into his home), and hence that the force was reasonable." *Id.* This language concedes that the jury "may" also find that storming the house was not reasonable under those circumstances.

Conversely, the Ninth Circuit held that if the jury concluded that the police battered down the door to help the inspectors inspect the home, that they "may" find that the force was excessive. *Id.* Again, this means that the court also believed that under such circumstances, the jury "may" find that the force was reasonable.

The conflict between the Ninth Circuit's decision in *Alexander* and the Tenth Circuit's decision in *Holland* lies in the simple fact that the Ninth Circuit held that the issue of

whether the decision to send the tactical team to execute a dynamic entry into Quade's home constituted excessive force was not subject to a motion for summary judgment because a jury may return a verdict for the plaintiffs. *See Liberty Lobby, Inc.* 477 U.S. at 252 (holding that summary judgment should not be entered if, viewing the evidence in a light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor, a reasonable jury could return a verdict for that party).

By contrast, the Tenth Circuit held that, as a matter of law, the decision to deploy the SWAT team did not constitute excessive force. In other words, according to the Tenth Circuit, no reasonable jury could find that the amount of force represented by a SWAT team executing a dynamic entry constituted excessive force under the facts of this case.

Thus, on the one hand the Ninth Circuit denied summary judgment because it believed that even if the jury found that the tactical team used dynamic entry to arrest a barricaded man who threatened to shoot anyone who came into his home, that the jury may find that the decision to use a dynamic entry force constituted excessive force. On the other hand, the Tenth Circuit held that the decision to use the SWAT team to execute a misdemeanor warrant on a subject without a criminal history, who the police had no reason to believe would resist arrest, did not constitute excessive force as a matter of law. These two decisions cannot be reconciled.

3. The Decision of the Tenth Circuit is Incorrect.

As *Graham* teaches, analysis of an excessive force claim "requires careful attention to the facts and circumstances of each particular case, including the severity of crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." 490 U.S. at 396. Using these factors as a touchstone, the facts of this case militate against the court of appeals'

decision holding that the decision to deploy a SWAT team to conduct a dynamic entry raid of the Heflin family home was not violative of the petitioners' Fourth Amendment rights to be free from unreasonable searches and seizures as a matter of law.

First, the crime at issue was a misdemeanor assault in which the alleged victim, Tonya Edwards, suffered little injury. No guns or weapons were brandished by anyone at the incident.

Second, there was no immediate threat to any law enforcement personnel and the respondents had no reason to believe that anyone would physically resist arrest or attempt to evade arrest by flight. The respondents knew that Sammy Heflin had no criminal record. The respondents testified that they had no reason to believe that Sammy Heflin would physically resist arrest. In fact, they knew him to be cooperative in his previous dealings with them to the point of being "polite." Furthermore, the respondents had no reason to believe that anyone who lived at the Heflin home would physically resist arrest.

The respondents knew that none of the other suspects lived at the Heflin home and had no reason to believe that any of the other suspects would be present at the Heflin residence. The respondents were aware that: Dove and Erdman had been apprehended without incident; Jack Marshall was a resident of Bayfield and did not live at the Heflin residence; and that Mike and Bob, whose last names were unknown, were residents of Farmington, New Mexico.

Thus, the totality of the facts and circumstances establish that a reasonable jury could find that the decision to order the deployment of the SWAT team was objectively unreasonable and constituted an unconstitutional use of excessive force. Consequently, the court of appeals' was incorrect when it held that the respondents' decision to deploy a SWAT team under the facts of this case did not, as a matter of law, constitute excessive force.

In *Garner*, 471 U.S. at 8, the Court opined that in order to determine whether force used by the police was excessive, one must "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."

In this case, the nature and quality of the intrusion was significant. As Chief Judge Babcock observed in his decision, "it is beyond dispute that the deployment of a SWAT team and, *a fortiori*, the decision to utilize a SWAT team implicates Fourth Amendment rights." *See* App. 42a. Harrington implicitly acknowledged that using a SWAT team to execute a dynamic entry is a significant use of force when she decided to deploy the SWAT team in order to "teach that piece of shit a lesson." The respondents knew that the SWAT team would enter the Heflin residence with weapons at the ready position and would point their weapons at individuals in that residence to secure their cooperation.

Moreover, the governmental interest as stake was illusory. According to the respondents expert witness in police tactics, "common sense dictates" the decision making process for deploying a SWAT team. Common sense also dictates whether a law enforcement officer seeks a search warrant based on its value in light of the evidence already collected. The respondents' rationale for deploying the SWAT team defies common sense.

In this case, according to Harrington and Davis, the purpose of the warrant was to obtain physical evidence linking Sammy Heflin to the alleged assault. According to Schirard and Davis, they decided to use the SWAT team because of the search warrant and the "urgency" to obtain physical evidence to link Sammy Heflin to the scene of the crime before such evidence could be destroyed. Therefore, if there was no or little need for a search warrant to obtain physical evidence linking Sammy Heflin to the alleged assault or if the evidence could not be easily destroyed, there was no need to deploy the SWAT team to effectuate a dynamic entry.

There was no need to obtain a search warrant for an unfortunate reason - Sammy Heflin is "easily identifiable" because, as described by Schirard, Harrington and Davis, Sammy has "significant" burns on his face, his face is "very disfigured" and "severely scarred." Before the SWAT team raid, Robin Harrington had spoken to three individuals, all of whom identified Sammy Heflin by name and/or his scarred face, as being at the scene of the incident.

More importantly, the La Plata County Sheriff's Department recognizes that using the SWAT team solely for the purpose of preserving evidence is improper. The Department policy provides that:

> It was reaffirmed that LPCSD [La Plata County Sheriff's Department] would use a dynamic entry only when it was deemed that serious bodily injury would occur to persons if a dynamic entry was not used. Dynamic entry would not used to simply preserve evidence that might be destroyed if a slower form of entry is made.

Thus, the main reason the respondents gave for ordering the deployment of the SWAT team – the urgency to preserve evidence – cannot be a justification for using a SWAT team under the Sheriff's Department's own guidelines.

Furthermore, the claim that the evidence set forth in the search warrant – clothes, cowboy hat, ball cap and cigarette packages - could be "easily destroyed" is ridiculous on its face.

Certainly, the level of intrusion used to obtain this evidence was grossly out of proportion to the governmental interest or need for this evidence. Given that there was no justification for deploying the SWAT team under the facts of this case, it begs the question of why a SWAT team was used. That question is answered by Investigator Cheverie: Undersheriff Harrington wanted "to teach this piece of shit a

lesson." While improper motive is irrelevant to a determination of objective reasonableness under *Graham v. Conner*, it can be relevant to the issue of the credibility of the officer's account and for purposes of the officer's claim of "good faith" in their qualified immunity defense. *Graham* at n. 12. Jim Cheverie's testimony, which must be deemed to be true for purposes of evaluating the merits of the respondents' motion for summary judgment, destroys Harrington's credibility concerning the necessity and rationale of using a SWAT team and her claim of "good faith" with respect to the issue of qualified immunity.

If the Court allows the court of appeals majority decision to stand, it would be hard to imagine a situation in which a decision to deploy a SWAT team might violate the constitution, at least in the Tenth Circuit. The court of appeals' majority decision gives law enforcement agencies virtually unbridled rein to deploy SWAT teams in almost any situation without any constitutional constraint or limitation.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition.

Respectfully submitted,

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February 2001

(Any footnotes trail the end of each document.)
No. 99-1373

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SHELBY PAIGE HOLLAND, a minor, by and through her next friend and parent Tessa Kay Overdorff; MARTY SHANE HOLLAND, a minor, by and through his next friend and parent Tessa Kay Overdorff; ANTHONY SCOTT "SCOTTY" HOLLAND, a minor, by and through his next friend and parent, Tonie Pauline Heflin; KRISTY DENISE HOLLAND DANE; RANDY JOE HOLLAND; TESSA KAY OVERDORFF; TONIE PAULINE HEFLIN; SAMUEL ALLEN HEFLIN, Plaintiffs-Appellees,

v.

ROBIN S. HARRINGTON, individually, and in her official capacity as Undersheriff of La Plata County, Colorado; DUKE SCHIRARD, individually, and in his official capacity as the Sheriff of La Plata County, Colorado; KELLY DAVIS, individually, and in his official capacity as a deputy sheriff of the La Plata County Sheriff's Department, Defendants-Appellants.

October 19, 2001, Filed

COUNSEL:
Theodore S. Halaby (Sue Ann Haskell, with him on the brief) of Halaby, Cross & Schluter, Denver, Colorado, for Defendants-Appellants.

William E. Zimsky, of Abadie & Zimsky, LLC, Durango, Colorado, for the Plaintiffs-Appellees.

JUDGES:
Before HENRY and BRISCOE, Circuit Judges; and JENKINS, Senior District Judge. * HENRY, J., concurring in part and dissenting in part.

OPINIONBY:
Bruce S. Jenkins

OPINION:

JENKINS, Senior District Judge.

Plaintiffs brought this civil rights action under 42 U.S.C. § 1983, alleging that the La Plata County Sheriff's Department SWAT Team subjected them to excessive force in violation of the Fourth Amendment's guarantee that persons be free from unreasonable searches and seizures. Defendants-appellants Robin S. Harrington, Duke Schirard and Kelly Davis appeal the district court's order denying in part their motion for summary judgment based on the defense of qualified immunity. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm in part, reverse in part and remand.

FACTUAL BACKGROUND

On April 14, 1996 at approximately 2:00 a.m., an altercation occurred outside Virginia's Steakhouse, a restaurant located in La Plata County, Colorado. According to the victims and some witnesses, several men assaulted a group of patrons, throwing them to the ground where they were kicked and beaten, often by several men at once. During their investigation of the incident, La Plata County Sheriff's Department officers learned the names of several suspects, including Samuel "Sammy" Allen Heflin. The Sheriff's Department obtained warrants for Heflin's arrest on misdemeanor assault and reckless endangerment charges, and to search his residence and other buildings located on his property, looking for a black cowboy hat, Marlboro cigarette packages, a bloody shirt, restaurant receipts, and other items believed to be evidence tying Heflin and others to the assaults. The search warrant authorized a search "at any time, day or night," but did not contain language authorizing a "no knock" entry.

Several hours beforehand, Sheriff Duke Schirard authorized the use of the Sheriff's Department SWAT Team, comprised of ten deputy sheriffs led by defendant Kelly Davis, to serve

the warrants on the evening of April 16, 1996. Undersheriff Robin Harrington accompanied Sheriff Schirard to the Heflin residence, bringing with her copies of the warrants.

At approximately 8:30 p.m. on April 16, the SWAT Team executed the warrants. Seven SWAT Team members dressed in green camouflage clothing with no identifying markings and hoods showing only their eyes approached the residence, together with defendant Davis. [1] Three uniformed deputies were also present.

Randy Joe Holland, 18, Marty Shane Holland, 8, and Ray Walker, 24, were playing basketball in the driveway. Three SWAT Team deputies approached rapidly, brandishing weapons; one of them pointed his weapon at the three young men and ordered them to lie face down on the ground, and continued pointing his weapon at them as they lay there. [2]

Three SWAT deputies next encountered Anthony "Scotty" Holland, 14, near the bunkhouse and at gunpoint ordered him to lie on the ground. He was kept in a prone position for nearly 10 minutes.

Also outdoors when the SWAT Team arrived was four-year-old Shelby Paige Holland, who upon seeing the armed deputies in their combat costumes, ran screaming into the residence, pursued by SWAT deputies. According to the plaintiffs, one SWAT deputy pursued the child inside the house, training his laser-sighted weapon on the child's back as evidenced by the tell-tale glowing red dot.

The SWAT deputies then entered the residence, though it remains in dispute whether they knocked and announced their presence, or in any way identified themselves as law enforcement officers. [3] At the time that the SWAT Team entered, there were five persons inside: "Sammy" Heflin and his wife Tonie were seated at the dining room table; Kristi Holland Dane was in the kitchen; and Tessa Sliter [4] (Shelby Holland's mother) and Helen Kennedy were in a back bedroom.

SWAT deputies ordered Sammy Heflin, Tonie Heflin and Kristi Dane at gunpoint to lie face down on the living room floor. [5] SWAT deputies also followed Shelby Holland into the

back bedroom and held Tessa Sliter and Helen Kennedy at gunpoint, moving them from the back bedroom into the living room.

All persons found outdoors or inside the residence were held in the living room by SWAT deputies until a "wants and warrants" check was completed on each one. Meanwhile, the deputies conducted a search of the Heflin property. [5] When the check was completed, the deputies told them they could leave, with the exception of Sammy Heflin, who was placed under arrest pursuant to the warrant. Everyone else then left the residence and went to the home of Mike Beatty (Tonie Heflin's brother).

Several empty packs of Marlboro Light cigarettes were found in vehicles on the Heflin property, but no bloody clothing was discovered. (Appellant App. at 262.) Plaintiffs allege that nothing found at the Heflin residence on April 16 was offered as evidence at the subsequent trial of Sammy Heflin.

Sammy Heflin was acquitted of the misdemeanor charges.

The district court granted summary judgment in favor of the La Plata County Sheriff's Department, and on qualified immunity grounds in favor of Schirard, Harrington and Davis on plaintiffs' "excessive force" claims arising from the April 16 raid, except as to the reasonableness of (1) the decision to employ the SWAT Team; (2) the SWAT Team's use of weapons against minor children, and (3) the officers' alleged failure to "knock and announce" their entry into the Heflin residence.

I

In civil rights actions seeking damages from governmental officials, "those officials may raise the affirmative defense of qualified immunity, which protects 'all but the plainly incompetent or those who knowingly violate the law.' " Gross v. Pirtle, 245 F.3d 1151, 1155 (10th Cir. 2001) (quoting Malley v. Briggs, 475 U.S. 335, 341, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986)). The protection of qualified immunity gives officials "'a right, not merely to avoid "standing trial," but also to avoid the burdens of "such pretrial matters as discovery."'" Id. (quoting Behrens v. Pelletier, 516 U.S. 299, 308, 133 L. Ed. 2d

773, 116 S. Ct. 834 (1996) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985))).

> Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." Mitchell v. Forsyth, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985). The privilege is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." Ibid. As a result, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." Hunter v. Bryant, 502 U.S. 224, 227, 116 L. Ed. 2d 589, 112 S. Ct. 534 (1991) (per curiam).

Saucier v. Katz, 150 L. Ed. 2d 272, 121 S. Ct. 2151, 2155-56 (June 18, 2001) (emphasis in original).

We review de novo the denial of a summary judgment motion raising qualified immunity questions. Gross, 245 F.3d at 1155; Wilson v. Meeks, 52 F.3d 1547, 1551 (10th Cir. 1995). "Because of the underlying purposes of qualified immunity, we review summary judgment orders deciding qualified immunity questions differently from other summary judgment decisions." Medina v. Cram, 252 F.3d 1124, 1128 (10th Cir. 2001) "After a defendant asserts a qualified immunity defense, the burden shifts to the plaintiff," and the plaintiff "must first establish that the defendant's actions violated a constitutional or statutory right." Id.

> A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. Siegert v. Gilley, 500 U.S. 226, 232, 114 L. Ed. 2d 277, 111 S. Ct. 1789

> (1991). In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.

Saucier, 121 S. Ct. at 2156.

If a "favorable view" of the facts alleged show the violation of a constitutional right, "the next, sequential step is to ask whether the right was clearly established" at the time of the defendant's unlawful conduct. Id.; Albright v. Rodriguez, 51 F.3d 1531, 1534 (10th Cir. 1995). In determining whether the right was "clearly established," the court assesses the objective legal reasonableness of the action at the time of the alleged violation and asks whether "'the contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Id. (quoting Anderson v. Creighton, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987)). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id. (citing Wilson v. Layne, 526 U.S. 603, 615, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999)).

Applying the same standards as the district court, we must determine whether the plaintiff has satisfied this "heavy two-part burden." Albright, 51 F.3d at 1534. If the plaintiff fails to satisfy either part of the two-part inquiry, the court must grant the defendant qualified immunity. Id. at 1535. Conversely,

> If the plaintiff successfully establishes the violation of a clearly established right, the burden shifts to the defendant, who must prove "'that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law.'". . . In short, although we will review the evidence in the light most favorable to the nonmoving party, . . . the record must clearly demonstrate the plaintiff has satisfied his heavy two-part burden; otherwise, the defendants are entitled to qualified immunity.

Medina, 252 F.3d at 1128 (citations omitted).

A district court's denial of a defendant's summary judgment motion based on qualified immunity represents "an immediately appealable collateral order when the issue appealed concerns whether certain facts demonstrate a violation of clearly established law," rather than questions of the sufficiency of the evidence. Id. at 1130 (citing Mitchell v. Forsyth, 472 U.S. 511, 527-28, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985)). [7] Even when the district court concludes issues of material fact exist, "we have reviewed the legal question of whether a defendant's conduct, as alleged by the plaintiff, violates clearly established law. . . ." Id. at 1130 (citations omitted).

II

Plaintiffs allege that their Fourth Amendment right to be free from unreasonable searches and seizures [8] was violated when the Sheriff's Department SWAT Team seized each of them using excessive force. They seek to hold defendants-appellants Schirard, Harrington and Davis liable for that violation because of their respective roles in planning and carrying out the April 16 raid. Schirard, Harrington and Davis respond that no Fourth Amendment violation occurred because (1) the plaintiffs (except Sammy Heflin) were not "seized" during the raid; (2) no plaintiff suffered physical harm from the actions of the officers conducting the raid; and (3) the planning of the raid, including the decision to employ a SWAT team, falls beyond the scope of the protection afforded by the Fourth Amendment.

Supervisory Liability of Davis

Kelly Davis, was supervisor of the SWAT Team and was present at the scene throughout the April 16 raid, and maybe held liable for the alleged unconstitutional acts of his subordinates if plaintiffs-appellees demonstrate an "affirmative link" through facts showing that he actively participated or acquiesced in the constitutional violation. See Winters v. Board of County Comm'rs, 4 F.3d 848, 855 (10th Cir. 1993) (citing Rizzo v. Goode, 423 U.S. 362, 46 L. Ed. 2d 561, 96 S. Ct. 598 (1976)); Snell v. Tunnell, 920 F.2d 673, 700 (10th Cir. 1990) ("For supervisory liability [in a § 1983 action], plaintiffs must demonstrate an affirmative link between the supervisor's conduct and the constitutional deprivation."). A plaintiff may show that "'an affirmative link exists between the [constitutional] deprivation and either the supervisor's personal participation, his exercise of control or direction, or his failure to supervise.'" Worrell v. Henry, 219 F.3d 1197, 1214 (10th Cir. 2000) (quoting Meade v. Grubbs, 841 F.2d 1512, 1527 (10th Cir. 1988) (quotation omitted)); see Snell, 920 F.2d at 700 ("Plaintiffs must show that a supervisory defendant, expressly or otherwise, authorized, supervised, or participated in conduct which caused the constitutional deprivation.").

Plaintiffs-appellees argue that Davis failed to direct the SWAT deputies under his command to conduct the execution of the warrants in a constitutionally appropriate manner, and that Davis' failure to supervise provides the affirmative link between Davis' conduct and the SWAT deputies' use of excessive force.

Whether Plaintiffs were "Seized"

"Violation of the Fourth Amendment requires an intentional acquisition of physical control." Brower v. County of Inyo, 489 U.S. 593, 596, 103 L. Ed. 2d 628, 109 S. Ct. 1378 (1989). One need not be the target of a search or be the person named in an arrest warrant to be "seized" within the meaning of the Fourth Amendment: "A seizure occurs even when an unintended person or thing is the object of the detention or taking, . . . but the detention or taking itself must be willful." Id. (citations omitted). Thus, each of the plaintiffs was

"seized" during the April 16 raid if "there is a governmental termination of [plaintiff's] freedom of movement through means intentionally applied," regardless of whether he or she was the subject of an arrest warrant or was ultimately placed under arrest. Id. at 597 (emphasis in original).[9]

We are satisfied that the uncontroverted facts before the district court show that each of the plaintiffs was "seized" within the meaning of the Fourth Amendment during the April 16 raid. Physical force was intentionally applied by the Sheriff's Department SWAT Team and each of the plaintiffs submitted to that show of authority until Lieutenant Davis informed them that they were free to leave. (Mr. Heflin, of course, was formally placed under arrest and taken into custody.)

Fourth Amendment Reasonableness

Tennessee v. Garner, 471 U.S. 1, 7, 85 L. Ed. 2d 1, 105 S. Ct. 1694 (1985), makes it clear that the Fourth Amendment requires an examination of "the reasonableness of the manner in which a search or seizure is conducted[:]"

> To determine the constitutionality of a seizure "we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." United States v. Place, 462 U.S. 696, 703, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983); . . . We have described "the balancing of competing interests" as "the key principle of the Fourth Amendment." Michigan v. Summers, 452 U.S. 692, 700 n.12, 69 L. Ed. 2d 340, 101 S. Ct. 2587 (1981). . . . Because one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out. . . .

471 U.S. at 8 (emphasis added & some citations omitted). Garner plainly rejected the view that the Fourth Amendment has nothing to say about how a seizure is made. To the contrary, a court must scrutinize whether "the totality of the

circumstances justified a particular sort of search or seizure." Id. at 9. [10]

> The reasonableness of an officer's conduct must be assessed "from the perspective of a reasonable officer on the scene," recognizing the fact that the officer may be "forced to make split-second judgments" under stressful and dangerous conditions. . . . The Fourth Amendment standard requires inquiry into the factual circumstances of every case; relevant factors include the crime's severity, the potential threat posed by the suspect to the officer's and others' safety, and the suspect's attempts to resist or evade arrest. . . .

Gross, 245 F.3d at 1158 (citing Graham v. Connor, 490 U.S. 386, 396-97, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989)) (citations omitted).

Fourth Amendment Reasonableness and the April 16th Raid

Taking the April 16th raid on the Heflin residence and the resulting seizures of persons in the light most favorable to the parties asserting the injury, "do the facts alleged show the officers' conduct violated a constitutional right?" Saucier, 121 S. Ct. at 2156.

The district court ruled that the facts alleged do not show a violation of constitutional right, with three exceptions: (1) the decision to employ the SWAT Team; (2) the SWAT Team's use of weapons against minor children, and (3) the officers' alleged failure to "knock and announce" their entry into the Heflin residence.

(1) The Decision to Use the SWAT Team

We must decide whether Fourth Amendment scrutiny extends to the planning of an arrest by law enforcement officials and in particular, to the decision to employ a SWAT team to make an arrest on a misdemeanor warrant and to conduct a search of a residence. The district court held that it does, and denied summary judgment in favor of Schirard,

Harrington, and Davis because the facts underlying the issue of reasonableness remain in dispute.

In Medina v. Cram, this court recently reaffirmed that the "totality of the circumstances" surrounding a seizure embraces conduct "immediately connected with the seizure," such as police conduct "arguably creating the need for force" where use of excessive force has been alleged. 252 F.3d at 1132; accord, Bella v. Chamberlain, 24 F.3d 1251, 1256 (10th Cir. 1994) ("Obviously, events immediately connected with the actual seizure are taken into account in determining whether the seizure is reasonable.").

Schirard, Harrington and Davis contend that the decision to employ the SWAT Team to execute the Heflin search and arrest warrants and the planning of the April 16 raid on the Heflin residence were not conduct "immediately connected with the seizure" of the plaintiffs-appellees during the raid itself, and are herefore beyond the reach of the Fourth Amendment. [11] Moreover, they argue that plaintiffs-appellees cannot show that a reasonable officer would have known on April 16, 1996 that the decision to employ a SWAT team to execute a misdemeanor arrest warrant in and of itself would violate plaintiffs-appellees' Fourth Amendment rights, in light of the clearly established law of this or other circuits at that time. Consequently, they insist that they are entitled to qualified immunity and that the district court's order denying summary judgment in their favor should be reversed.

Plaintiffs-appellees point to no Supreme Court or Tenth Circuit case authority squarely addressing this issue. [12] Authority from other circuits proves to be sparse at best. [13]

Andrade v. Chojnacki, 65 F. Supp. 2d 431 (W.D. Tex. 1999), was a Federal Tort Claims Act case arising out of two organized assaults by federal law enforcement officers on the Branch Davidian compound in Waco, Texas in February and April of 1993. The Andrade court concluded that plaintiffs' claims as to the planning of these "dynamic entry" operations failed to state a claim under the Fourth Amendment, observing that "the decision to use 'dynamic' entry is not, in and of itself, a violation of the Fourth Amendment." Id. at 457 (no citation to authority). Further, "there are absolutely no

specific facts contained in Plaintiffs' complaints that would suggest that any of the named Defendants planned any activity for the specific purpose of causing harm to the Davidians." Id. Thus, Andrade suggests that to be actionable under the Fourth Amendment, the facts surrounding the planning of a "dynamic entry" operation must show that the planning included the specific intent to cause harm through the use of excessive force.

In Williams v. Richmond County, Georgia, 804 F. Supp. 1561 (S.D. Ga. 1992), the court observed that "merely deploying the SWAT team was not an unreasonable seizure which raises constitutional problems. Even if law enforcement officials here arguably erred in judgment when they decided on a plan that employed potentially deadly force," the court continued, "such evidence falls short of a showing that there was no plausible basis in this instance for the officials' belief that this degree of force might be necessary." Id. at 1569.

The decision to deploy a SWAT team to execute a warrant necessarily involves the decision to make an overwhelming show of force–force far greater than that normally applied in police encounters with citizens. Indeed, it is the SWAT team's extraordinary and overwhelming show of force that makes "dynamic entry" a viable law enforcement tactic in dealing with difficult and dangerous situations.

The decision to use a SWAT team to make a "dynamic entry" into a residence constitutes conduct "immediately connected with the seizure" because it determines the degree of force initially to be applied in effecting the seizure itself. If, as Garner instructs, "it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out," 471 U.S. at 8, then the decision to deploy a SWAT team to execute a warrant must be "reasonable" because it largely determines how the seizure is carried out, thereby determining the extent of the intrusion on the individual's Fourth Amendment interests. Both Williams and Andrade examined the reasonableness of the decision to deploy a SWAT team in each case, rather than placing that decision beyond Fourth Amendment scrutiny altogether.

Where a plaintiff claims that the use of a SWAT team to effect a seizure itself amounted to excessive force, we review the decision to use that degree of force by "balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." Garner, 471 U.S. at 8 (internal quotation omitted).

In this case, Schirard, Harrington and Davis assert that several considerations counseled in favor of deploying the SWAT Team to execute the Heflin warrants:

> The situation at plaintiff Sammy Heflin's compound that day was potentially very dangerous to all parties on the scene, officers and civilians alike. The SWAT team members knew there would probably be children there, and were concerned about their safety. . . . The SWAT team knew that plaintiff Sammy Heflin had a history of violence. . . . The SWAT team knew that several other individuals who resided in the 60-acre compound had histories of criminal violence. . . . The SWAT team was unsure of the total number of adults who resided at the compound, but suspected there were as many as seven or eight. . . . The SWAT team suspected there would be firearms in the residence. . . . The SWAT team's goal was to effect the arrest and search warrant quickly, without injury, and to preserve evidence. And, the SWAT team was successful–no shots were fired and no one was injured.

(Appellants' Brief at 22 (citations omitted).)

The plaintiffs-appellees strongly dispute the accuracy of this characterization of the facts, pointing out that the raid involved a misdemeanor warrant, that the officers "knew that Sam Heflin had no criminal record and that none of the suspects lived at the Heflin home." (Appellees' Brief at 45.) Furthermore, the officers "had no reason to believe that anyone they ... believed lived at the Heflin home would physically resist arrest," or "to believe that Sam Heflin would physically resist arrest. In fact, they knew him to be

cooperative in his previous dealings with them to the point of being 'polite.'" (Id.) They argue that the decision to use the SWAT Team was made–in Harrington's words–in order to "teach this piece of sh** a lesson." (Id. at 6, 44.) They also assert that Schirard decided to use the SWAT team to preserve physical evidence sought pursuant to the search warrant, even though that evidence could not easily be destroyed.. (Id. at 8, 40-43.)

Viewed most favorably to those claiming injury, the facts alleged by plaintiffs-appellees nevertheless do not show that by itself, the display of force inherent in the deployment of the SWAT team–the force invoked by the decision to deploy–was excessive under Fourth Amendment standards. Nor can it fairly be said that Schirard, Harrington and Davis lacked any plausible basis for believing that "dynamic entry" was warranted in this situation. As they had anticipated, the deputies executing the warrants encountered several persons besides Sam Heflin both inside and outside the house on the Heflin property, and firearms were found at the residence. There existed the possibility of an altercation, but given the SWAT team's swift action, no such incident actually occurred. In hindsight, plaintiffs argue that an altercation was highly unlikely to occur, but we are not prepared to conclude that the Sheriff's concerns prior to the April 16 raid were so unwarranted as to render "dynamic entry" by itself an excessive use of force.

The specific conduct of the SWAT deputies during the April 16 raid is another matter, but plaintiffs did not show that Schirard, Harrington or Davis decided to use the SWAT team knowing that the SWAT team would use excessive force, intending to cause harm to any person, or that they instructed the SWAT team to use excessive force while conducting the April 16 raid. Absent such facts, no violation of a constitutional right arising from the decision to deploy the SWAT Team to execute the warrants has been established. [14]

The district court erred in denying summary judgment in favor of Schirard, Harrington and Davis on qualified immunity as to this claim. As this was the only remaining

basis of liability for Schirard and Harrington, they should be dismissed from the action.

(2) Display and Pointing of Firearms at Children

The Sheriff deployed the SWAT Team on April 16 to conduct a search and to arrest one individual at a residence pursuant to lawful warrants. The officers knew in advance that other persons, including children would be present. In conducting the search and effecting the seizure of Sammy Heflin, the SWAT deputies held each of the plaintiffs-appellees at gunpoint, initially forcing several of them to lie down on the ground for ten to fifteen minutes, and ultimately gathering all of them in the living room of the residence where they were held until all but Mr. Heflin were released.

The district court acknowledged that "the right to arrest an individual carries with it the right to use some physical coercion to effect the arrest," and that it is "not unreasonable for officers to carry weapons or to take control of a situation by displaying their weapons." (Order, dated August 3, 1999, at 16 (citing Thompson v. City of Lawrence, Kansas, 58 F.3d 1511, 1516 (10th Cir. 1995)).) However, the district court concluded that "the undisputed testimony that the SWAT team pointed weapons at young children during the entry" raised a triable issue as to reasonableness, and denied defendants' motion for summary judgment (Id.)

The district court's conclusion as to reasonableness finds support in prior case law. In Baker v. Monroe Township, 50 F.3d 1186 (3d Cir. 1995), police officers detained four persons, two of whom were minors, who were approaching a house that was the subject of a drug raid. The officers ordered the four down on the ground, handcuffed them, and held them at gunpoint. The Third Circuit held their continued detention at gunpoint to be unreasonable; the four persons had not attempted to resist or interfere, and there was "simply no evidence of anything that should have caused the officers to use the kind of force they are alleged to have used." Id. at 1193.

In McDonald v. Haskins, 966 F.2d 292 (7th Cir. 1992), the Seventh Circuit held that a police officer violated Fourth

Amendment rights by aiming his firearm at the head of a nine-year-old boy and threatening to pull the trigger. The child "was not being arrested, nor was he even suspected of committing a crime," and posed no threat to the officer, other officers or the community. Id. at 294 (citing Black v. Stephens, 662 F.2d 181, 189 (3d Cir. 1981) ("For an unidentified officer to brandish his revolver eighteen inches from [the subject]'s head with [his wife] in the precise line of fire and then threaten to shoot, is conduct that shocks the conscience.")).

The display of weapons, and the pointing of firearms directly at persons inescapably involves the immediate threat of deadly force. Such a show of force should be predicated on at least a perceived risk of injury or danger to the officers or others, based upon what the officers know at that time. "These are the very ingredients relevant to an excessive force inquiry." McDonald, 966 F.2d at 294. Where a person has submitted to the officers' show of force without resistance, and where an officer has no reasonable cause to believe that person poses a danger to the officer or to others, it may be excessive and unreasonable to continue to aim a loaded firearm directly at that person, in contrast to simply holding the weapon in a fashion ready for immediate use. Pointing a firearm directly at a child calls for even greater sensitivity to what may be justified or what may be excessive under all the circumstances.

In McDonald, the Seventh Circuit explained:

> It should have been obvious to Haskins that his threat of deadly force–holding a gun to the head of a 9-year-old and threatening to pull the trigger–was objectively unreasonable given the alleged absence of any danger to Haskins or other officers at the scene and the fact that the victim, a child, was neither a suspect nor attempting to evade the officers or posing any other threat. As we observed in Lester, 830 F.2d at 711, "Although the issue in Garner was deadly force, implicit in its totality of the circumstances approach is that police use of

> less than deadly force would violate the Fourth Amendment if not justified under the circumstances."

966 F.2d at 295.

Taken in the light most favorable to the plaintiffs-appellees, the facts alleged concerning the pointing of firearms at the child bystanders found at the Heflin residence on April 16, 1996 show the officers' conduct violated a constitutional right. While the SWAT Team's initial show of force may have been reasonable under the circumstances, continuing to hold the children directly at gunpoint after the officers had gained complete control of the situation outside the residence was not justified under the circumstances at that point. This rendered the seizure of the children unreasonable, violating their Fourth Amendment rights.

(3) Failure to "Knock and Announce"

Whether the SWAT deputies announced their identity before entering the Heflin residence on April 16 remains in genuine dispute. The question appears to be one of the sufficiency of the evidence to support plaintiffs-appellees' allegations. The witnesses recall events differently, and the trier of fact must decide whose testimony as to the event is to be believed. Even where issues of material fact exist, however, we may review the legal question of "whether a defendant's conduct, as alleged by the plaintiff, violates clearly established law." Medina, 252 F.3d at 1130 (citations omitted).

In reviewing that "legal question," the reasonableness of the alleged failure to knock and announce cannot be considered in isolation. We are called upon to evaluate one event, a single occurrence, in light of the applicable standards of conduct and the totality of the circumstances surrounding that single event.

Taking the facts alleged by plaintiffs-appellees as true, and considering the totality of the circumstances thus alleged, those facts show a violation of clearly established constitutional rights. See Wilson v. Arkansas, 514 U.S. 927, 936, 131 L. Ed. 2d 976, 115 S. Ct. 1914 (1995). Though the

Fourth Amendment "should not be read to mandate a rigid rule of announcement," Wilson squarely holds that "an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment," at least absent a sufficient showing of countervailing law enforcement interests. Id. at 934.

The genuine factual dispute concerning whether the officers announced their presence as they entered the Heflin residence has a direct bearing upon the Fourth Amendment reasonableness of the ensuing search. Other alleged facts, such as the officers' demeanor, bear upon Fourth Amendment reasonableness as well.

(4) Harsh Language

The district court rejected plaintiffs-appellees' claim that the SWAT deputies' use of foul and abusive language during the April 16 raid violated their Fourth Amendment rights. This allegation, too, may not be treated in isolation from the totality of the circumstances.

While "not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment," Graham, 490 U.S. at 396, "pushes and shoves, like other police conduct, must be judged under the Fourth Amendment standard of reasonableness." Saucier, 121 S. Ct. at 2160. The whole course of conduct of an officer in making an arrest or other seizure–including verbal exchanges with a subject–must be evaluated for Fourth Amendment reasonableness in light of the totality of the circumstances.

Of course, in conducting a search or making a seizure, "The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." Michigan v. Summers, 452 U.S. 692, 702, 69 L. Ed. 2d 340, 101 S. Ct. 2587 (1981). Simple instructions spoken in a firm, commanding tone of voice communicate clearly what an officer wants a subject to do, and likely would be most effective, particularly in dealing with bystanders and children.

In contrast, expletives communicate very little of substance beyond the officer's own personal animosity, hostility or

belligerence. Such animus would be entirely misplaced in dealing with bystanders or children, particularly where they have offered no resistance to the officers' initial show of force.

One can be firm and direct without being foul and abusive.

In evaluating the Fourth Amendment reasonableness of a seizure, the officers' verbal interaction as well as their physical conduct become part of the totality of the circumstances to be considered. While it seems unlikely that harsh language alone would render a search or seizure "unreasonable," verbal abuse may be sufficient to tip the scales in a close case.

Violation of Fourth Amendment Rights

Outfitting sheriff's deputies in hooded combat fatigues, arming them with laser-sighted weapons and ordering them to conduct the "dynamic entry" of a private home does not exempt their conduct from Fourth Amendment standards of reasonableness. The "SWAT" designation does not grant license to law enforcement officers to abuse suspects or bystanders, or to vent in an unprofessional manner their own pent-up aggression, personal frustration or animosity toward others. [15]

If anything, the special circumstances and greater risks that warrant "dynamic entry" by a SWAT team call for more discipline, control, mindfulness, and restraint on the part of law enforcement, not less. SWAT officers are specially trained and equipped to deal with a variety of difficult situations, including those requiring a swift and overwhelming show of force. At all times, SWAT officers no less than others--dressed in camouflage or not--must keep it clearly in mind that we are not at war with our own people.

Nor does the fact that none of the plaintiffs suffered physical injury during the raid foreclose a finding of excessive force.

Pointing to Bella v. Chamberlain, 24 F.3d 1251, 1257 (10th Cir. 1994), in which this court noted that "we have never upheld an excessive force claim without some evidence of physical

injury," Davis insists that plaintiffs' claims must fail. (Reply Brief at 12.)

Physical injury may be the most obvious injury that flows from the use of excessive force. Yet the interests protected by the Fourth Amendment are not confined to the right to be secure against physical harm; they include liberty, property and privacy interests–a person's "sense of security" and individual dignity. No physical injury was pleaded in Baker or McDonald. Nor was physical injury alleged in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971), which held that officers may be held liable in damages for violating persons' Fourth Amendment rights, including the use of unreasonable force.

Keeping in mind that the "'touchstone of the Fourth Amendment is reasonableness,'. . . measured in objective terms by examining the totality of the circumstances," the Supreme Court has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." Ohio v. Robinette, 519 U.S. 33, 39, 136 L. Ed. 2d 347, 117 S. Ct. 417 (1996) (citation omitted). We likewise decline to adopt a "bright-line" standard dictating that force cannot be "excessive" unless it leaves visible cuts, bruises, abrasions or scars. [16]

Taken in the light most favorable to the party asserting the injury, the facts alleged in this case show that the conduct of the La Plata County Sheriff's Department SWAT Team violated plaintiffs-appellees' Fourth Amendment rights.

III

As Saucier instructs, "the next, sequential step is to ask whether the right was clearly established." 121 S. Ct. at 2156.

"Clearly Established" Rights

Having determined as a preliminary matter that the conduct of the SWAT deputies alleged by plaintiffs-appellees violated a constitutional right, we must consider whether that alleged conduct violates "clearly established" law.

The Fourth Amendment's guarantee that people shall "be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures" has been part of our Constitution since 1791. The Fourth Amendment reasonableness standard "is 'clearly established' in the context of § 1983 actions" involving claims of excessive force. Gross, 245 F.3d at 1158 (citing Wilson, 52 F.3d at 1552). Indeed, "there is no doubt that Graham v. Connor . . . clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." Saucier, 121 S. Ct. at 2156.

The "knock and announce" requirement acknowledged by the Supreme Court in Wilson predates the April 16, 1996 raid by nearly a year, as does Baker and prior case law (e.g., McDonald, Black) dealing with the display and pointing of weapons.

As a general proposition, the law that a search or seizure must be objectively "reasonable" under all the circumstances has been "clearly established" for a long time. [17] It is also clearly established that police use of less than deadly force in seizing and detaining a person, particularly a bystander not suspected of any wrongdoing, must be justified under all of the circumstances. Lester, 830 F.2d 706, 711 (7th Cir. 1987) ("Police use of less than deadly force would violate the Fourth Amendment if not justified under the circumstances.").

Qualified Immunity, Excessive Force and Reasonable Mistakes

Here, however, the inquiry as to clearly established rights is more specific: "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, 121 S. Ct. at 2156.

Qualified immunity "operates in this case, then, just as it does in others, to protect officers from the sometimes 'hazy border between excessive and acceptable force,'. . . and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." Id. at 2158 (citing Priester v. Riviera Beach, 208 F.3d 919, 926-927 (11th Cir. 2000)). It grants "officers immunity for reasonable mistakes as to the

legality of their actions," and in excessive force cases, "in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply *in the* event the mistaken belief was reasonable." Id. at 2159. "Excessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred." Id.

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances.

Id. at 2158. "If the officer's mistake as to what the law requires is reasonable," Saucier explains, "the officer is entitled to the immunity defense." Id.

How do we evaluate whether a legal mistake is reasonable? A mistake of law may be "reasonable" where the circumstances "disclose substantial grounds for the officer to have concluded he had legitimate justification under the law for acting as he did." Id. at 2159-60.

Here, Davis asserts that the SWAT deputies announced themselves as they entered the Heflin residence. Even if that announcement was not heard in the turmoil of that moment, however, Davis asserts that based on their belief that Sammy Heflin had "recently been involved in a violent assault" and the other circumstances the SWAT team encountered on April 16, the SWAT deputies "were entitled to display their weapons and enter without knocking and announcing as a matter of law." (Reply Brief at 13-14 (citing Graham, 490 U.S. at 397).)

The young people encountered by the SWAT deputies as they entered the Heflin property offered no resistance. They did as they were told. The SWAT deputies' initial show of force gained immediate and unquestioned control of the situation outside the residence. Thereafter, the justification for continuing to hold the young people directly at gunpoint simply evaporated.

Davis argues that "it was not obvious to the officers that the minors would not interfere with their search. . . . Shelby, for example, ran screaming into the house, forcing the SWAT team to follow her in, allegedly without knocking and announcing." (Reply Brief at 13.) But Davis does not explain what facts would suggest to a reasonable officer that the young people detained outside would interfere with the search. None of the facts pointed to by Davis give any reason to believe that the young people posed any kind of threat. Indeed, with no small amount of irony, Davis asserts that continuing to hold the children at gunpoint "protected the children from the danger inherent in the situation," and that "concerned about" four-year-old Shelby's "safety," an officer trailed her at direct gunpoint only briefly: "the officer's laser shown on her back for, at most, two seconds." (Appellants' Brief at 23.)

We can find no substantial grounds for a reasonable officer to conclude that there was legitimate justification for continuing to hold the young people outside the residence directly at gunpoint after they had completely submitted to the SWAT deputies' initial show of force, or for training a firearm directly upon a four-year-old child at any time during the operation. Davis' supervision of the SWAT deputies during the raid furnishes the affirmative link between this violation and Davis' conduct; it appears uncontroverted that the SWAT deputies continued to point their weapons at the persons found on the Heflin property until Davis directed them to stop doing so at the conclusion of the search.

This violation does not reflect a reasonable mistake of law for which Davis should enjoy the benefits of qualified immunity. This was an invasion of a clearly established constitutional right, and the officers' mistake as to what the law requires

was unreasonable under all of the circumstances. Therefore, the district court properly denied summary judgment in favor of Davis on his assertion of qualified immunity.

CONCLUSION

Schirard and Harrington are entitled to summary judgment on qualified immunity as to the decision to deploy the SWAT Team. To that extent, the judgment of the district court is REVERSED, and as this was the only remaining basis of liability for Schirard and Harrington, upon remand they should be dismissed from the action. The judgment of the district court is otherwise AFFIRMED, and the case is REMANDED for further proceedings consistent with this Opinion.

Footnotes

* The Honorable Bruce S. Jenkins, United States Senior District Judge for the District of Utah, sitting by designation.

n1 Davis was present during the entire SWAT Team raid, accompanying the SWAT deputies as they approached, entered and remained inside the residence. Plaintiffs aver that they remained at gunpoint during the raid until Davis ordered SWAT deputies to lower or holster their weapons.

Schirard and Harrington arrived on the scene later, as the search was being concluded.

n2 Randy Holland testified that when eight-year-old Marty Holland asked one of the SWAT deputies if they were going to jail, he replied, "Probably." Davis testified that a uniformed officer, Deputy Shupe, remained with the boys.

n3 Plaintiffs allege that at least one SWAT deputy was shouting "get the f*** down!," without any other announcement, while defendant Davis testified that Deputy Sandoval announced two or three times, "Sheriff's Department, search warrant." (Appellant's App. 86-87.)

n4 Also known as Tessa Overdorff.

n5 According to the plaintiffs, Tonie Heflin repeatedly asked what was happening and expressed concern that the deputies

were pointing guns with young children present, to which SWAT deputies shouted, "Shut the f*** up!"

n6 When Tonie Heflin asked the deputies if they had a warrant, she testified that defendant Davis responded, "Shut the f*** up." The search warrant itself was delivered to Davis by Harrington shortly after the search was completed.

n7 "An order denying summary judgment based on qualified immunity necessarily involves a legal determination that certain alleged actions violate clearly established law." Gross, 245 F.3d at 1157 (citing Behrens, 516 U.S. at 313).

n8 The Fourth Amendment reads in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const., Amend. IV. This constitutional guarantee is "enforceable against the States through the Fourteenth [Amendment]." Colorado v. Bannister, 449 U.S. 1, 2, 66 L. Ed. 2d 1, 101 S. Ct. 42 (1980)) (per curiam); see also Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961); Wolf v. Colorado, 338 U.S. 45, 93 L. Ed. 1782, 69 S. Ct. 1359 (1949).

n9 One's freedom of movement is terminated "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,'" id. at 600 (Stevens, J., concurring in the judgment) (quoting United States v. Mendenhall, 446 U.S. 544, 554 n. 6, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980) (Stewart, J.)), and the police have applied physical force, however slight, or the person has submitted to a show of authority by the police. California v. Hodari D., 499 U.S. 621, 623-29, 113 L. Ed. 2d 690, 111 S. Ct. 1547 (1991); see also 1 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 2.1(a) (1996 & Supp. 2000).

n10 The Garner Court ruled that consistent with Fourth Amendment "reasonableness," deadly force may not be used to seize a fleeing suspect "unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Garner, 471 U.S. at 3. The

Court concluded that an officer's fatal shooting of a unarmed burglary suspect fleeing over a fence was not justified under the facts and circumstances in that case and that a state statute authorizing use of such force was unconstitutional. Id. at 21-22.

n11 Defendants-appellants rely on Carter v. Buscher, 973 F.2d 1328 (7th Cir. 1992), in which the Seventh Circuit rejected a claim that the Fourth Amendment "prohibits creating unreasonably dangerous circumstances in which to effect the legal arrest of a suspect." Id. at 1332. "The Fourth Amendment," Carter said, prohibits unreasonable seizures not unreasonable, unjustified or outrageous conduct in general. . . . Therefore, pre-seizure conduct is not subject to Fourth Amendment scrutiny." Id. (emphasis in original; citations omitted). In Carter, the Seventh Circuit read Garner as beginning its analysis "by identifying the 'seizure.' Then the Court proceeded to examine . . . whether the force used to effect the seizure was reasonable in the totality of the circumstances, not whether it was reasonable for the police to create the circumstances." 973 F.2d at 1332. Carter did not involve the use of a SWAT team to make an arrest.

n12 They rely on Myers v. Oklahoma County Bd. of County Comm'rs, 151 F.3d 1313 (10th Cir. 1998), in which this court examined for Fourth Amendment reasonableness the sheriff's decision that deputies enter the apartment of a suicidal suspect. The panel held the sheriff's decision to be objectively reasonable.

n13 For the law to be "clearly established," there "must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must be as plaintiff maintains." Foote v. Spiegel, 118 F.3d 1416, 1424 (10th Cir. 1997).

n14 In the alternative, plaintiffs-appellees assert that the decision to deploy the SWAT Team violated their right to due process of law under the Fourteenth Amendment. Where conduct falls beyond the reach of the Fourth Amendment, "Force inspired by malice or by 'unwise, excessive zeal amounting to an abuse of official power that shocks the conscience ... may be redressed under [the Fourteenth

Amendment]." Latta v. Keryte, 118 F.3d 693, 702 (10th Cir. 1997) (quoting Hewitt v. City of Truth or Consequences, 758 F.2d 1375, 1379 (10th Cir. 1985)). We are satisfied that on the facts as alleged by the plaintiffs-appellees, the decision to deploy the SWAT Team to execute the warrants did not amount to "an abuse of official power that shocks the conscience" under the circumstances of this case.

n15 E.g., trailing a frightened four-year-old child with a laser-sighted firearm appears, on its face, needlessly dangerous.

n16 A conclusion that an officer did not violate clearly established right may be "confirmed" by the fact that "the force was not so excessive that [plaintiff] suffered hurt or injury," Saucier, 121 S. Ct. at 2160, but the alleged violation itself must be examined in terms of the totality of the circumstances and "what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards." Id. at 2159.

n17 The scheme of the Fourth Amendment becomes meaningful only when it

> is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?

Terry v. Ohio, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

CONCURBY:
HENRY (In Part)

DISSENTBY:
HENRY (In Part)

DISSENT:

HENRY, J., concurring in part and dissenting in part:

The facts of this case as we must construe them on summary judgment are, to understate, disquieting. At 8:30 P.M. on April 16, 1996, seven camouflaged, unmarked, unidentified, and hooded SWAT team officers (from the La Plata County sheriff's office) swooped down upon a family compound, weapons brandished, laser sights sweeping, and interrupted an eight year old's basketball game, forcing him and his older playmates to the ground, before continuing their advance. The seven then continued their raid, sweeping their laser sights across the back of a scared and fleeing four year-old child. Barging into the house, they found their quarry seated with his wife at his dining room table. Forcing them to lie down at gunpoint, the seven next raided the bedroom, removing the two women there to the front room, where the others were held.

The purpose of this armed intervention? To serve a search and arrest warrant for a misdemeanor charge. Incidentally, Sammy Heflin was later acquitted of these misdemeanor charges. What is wrong with this picture?

Well, for one thing, we don't really know much about the plaintiff, Mr. Heflin. It does seem reasonable for the officers and their supervisors to have suspected him of assault and battery of some guests at a restaurant approximately two nights earlier. We do know Mr. Heflin was charged with a misdemeanor, but we are advised (and again, this is on summary judgment, where the record must be construed in favor of the non-moving party) that he had no criminal record, and, in fact, that he had no history of violence known to the police. We also know that the people who lived on Mr. Heflin's property had no history of violence known to the police (with one exception, and that exception had already been arrested and removed from the premises). There was no

evidence that the alleged assault in the restaurant involved any weapon.

But what kind of a supervisor would authorize such a raid? Our evidence further suggests that it was the kind of supervisor that wanted "to teach this piece of [excrement deleted] a lesson." Aplt's App. at 340-41 (depo. testim. of James Cheverie, investigator for Sheriff's Department, referring to statement of Undersheriff Harrington). The La Plata County Sheriff's Department's training session narrative instructed that the department

> would use a dynamic entry only when it was deemed that serious bodily injury would likely occur to persons if a dynamic entry was not used. Dynamic entry would not be used to simply preserve evidence that might be destroyed if a slower form of entry was made.

Id. at 415-16 (narrative from April 29, 1992 La Plata County Sheriff's Office training session). A dynamic entry would be "made to counter an immediate threat." Id. at 416. In addition, the evidence sought to be collected by the SWAT team (hats and cigarette packages, receipts and bills) was not easily destructible.

I join my colleagues in a well-crafted opinion, with one exception. My conscience, although not as shockable as it once was, is shocked by the planning that this kind of raid may very well have involved. Such planning would constitute force inspired by "unwise, excessive zeal amounting to an abuse of official power that shocks the conscience" that deserves "redress[] under the [Fourteenth Amendment]." Latta v. Keryte, 118 F.3d 693, 702 (10th Cir. 1997) (internal quotation marks omitted).

Certainly, the plaintiffs' case against Sheriff Schirard and Undersheriff Harrington would be stronger with factual allegations specifying their knowledge of the danger involved in such a "dynamic entry." But, the ordering of such an entry by Sheriff Schirard and Undersheriff Harrington, contrary to department policy (or at least without showing compliance

with department policy)-where seven armed guards converge on a compound where children are known to be playing, all in an effort to serve a warrant for a misdemeanor, coupled with Undersheriff Harrington's apparent animosity toward Mr. Heflin-gives rise to sufficient knowledge of danger that I would not cloak such reckless supervision with the protection of qualified immunity. I agree with the district court's conclusion that Sheriff Schirard's decision to use the SWAT team, the knowledge of which is charged to Undersheriff Harrington, "provides the 'affirmative link' between his 'personal participation' in the alleged deprivation of Plaintiffs' constitutional rights." Aplt's Br. ex. 2 (dist. ct. order filed Aug. 3, 1999) at 19.

I am certainly not ready to grant judgment for the plaintiffs, but I would not decide at the summary judgment stage that this conduct was not violative of the Fourth Amendment; or if the Fourth Amendment does not apply, I would not decide on summary judgment that this conduct is not violative of the Fourteenth Amendment's guarantee of substantive due process. Thus, I would affirm the district court's decision denying qualified immunity to defendants Schirard, Harrington, and Davis on the claims arising from the decision to employ the SWAT team.

Civil Action No. 98-B-229

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Lewis T. Babcock, Judge

SHELBY PAIGE HOLLAND, a minor, by and through her next friend and parent TESSA KAY OVERDORFF, MARTY SHANE HOLLAND, a minor, by and through his next friend and parent TESSA KAY OVERDORFF, ANTHONY SCOTT "SCOTTY" HOLLAND, a minor, by and through his next friend and parent, TONIE PAULINE HEFLIN, KRISTY DENISE HOLLAND DANE, RANDY JOE HOLLAND, TESSA KAY OVERDORFF, TOME PAULINE HEFLIN, and SAMUEL "SAMMY" ALLEN HEFLIN,
Plaintiffs,

v.

ROBIN S. HARRINGTON, individually and in her official capacity as Undersheriff of La Plata County, Colorado; DUKE SCHIRARD, individually and in his official capacity as the Sheriff of La Plata County, Colorado; KELLY DAVIS, individually and in his official capacity as a deputy sheriff of the La Plata County Sheriffs & Department of La Plata County; the LA PLATA COUNTY SHERIFFS DEPARTMENT,
Defendants.

ORDER

Filed August 3, 1999

This civil rights action, brought pursuant to 42 U.S.C. §§ 1983 and 1988 is based on allegations of excessive force and deprivation of rights to be free from unreasonable searches and seizures pursuant to the Fourth and Fourteenth Amendments to the United States Constitution. Pending is the motion for summary judgment filed by Defendants Robin S. Harrington (Undersheriff Harrington), Duke Schirard (Sheriff

Schirard), Kelly Davis (Deputy Sheriff Davis), and the La Plata County Sheriff's Department (LPCSD) (collectively, Defendants). Oral argument would not assist materially in the motion's resolution. After consideration of the motion and responses. I grant the motion in part and deny it in part.

The following facts are undisputed unless otherwise noted. This case involves the a search warrant issued on April16, 1996 and executed the same day by the La Plata County Sheriffs Department's SWAT team.

At approximately 2:00 a.m. on April 14, 1999, a group of patrons were assaulted outside of Virginia's Steakhouse, a restaurant in La Plata County. See Harrington search warrant & affidavit, Def. Ex. A, pp. 2-3. Though witness accounts differ somewhat, several men including Plaintiff Sammy Heflin were accused of the assaults. Id. According to the victims and some witnesses, the victims were thrown to the ground during the incident and were kicked and hit, often by several group members at once. Id.

During the investigation, the Sheriff's Department learned the names of several persons suspected of participating in the assaults including plaintiff Sammy Heflin. See First Amended Complaint ¶ 19. The LPCSD then obtained warrants for Mr. Heflin's arrest and for the search of his residence and out buildings located on his property. According to Defendants, the purpose of the search warrant was to obtain a hat, cigarette packages, a bloody shirt and other items believed to provide a link between the suspects and the assaults. See Search Warrant, ¶ 1, Ex. B.

The SWAT team comprised often deputy sheriffs led by defendant Lt. Kelly Davis, executed the warrants on April 16, 1996 at approximately-7:30-8:00 p.m. Id. at ¶ 19. Mr. Heflin was arrested and the search concluded within approximately thirty minutes. Davis Depo. Ex. C, p. 102. The search warrant authorized a search "at any time, day or night," but did not contain language authorizing a "no knock" entry. See Ex. B.

Undersheriff Robin Harrington entered the residence after it was secured and gave hard copies of the warrants to Lt. Davis. See Ex. D, Harrington Depo., pp. 85-86. Sheriff Schirard gave final authorization to use the SWAT team to execute the warrants, and rode as a passenger to the property with Undersheriff Harrington. Sheriff Schirard remained in the car while Undersheriff Harrington delivered the warrants, First Amended Complaint, ¶ 22; Ex.,D, Harrington Depo., pp. 85-87.

A. Information underlying issuance of the arrest and search warrants

1. Arrest warrant

The parties do not dispute that Mr. Heflin was identified by name by more than one person as one of the assailants involved in the fracas at Virginia's Steakhouse in the early hours of Sunday, April 14, 1995. In addition, several witnesses described one of the assailants as having a badly scarred face. Mr. Heflin suffered extensive facial scarring as a result of an oil field explosion many years ago. Based on this information, on April 16, 1995, the Sheriffs Department obtained an arrest warrant for Mr. Heflin for third degree assault, a class 1 misdemeanor, see § 18-3-208, C.R.S., and reckless endangerment, a class 3 misdemeanor. See § 18-3-208, C.R.S. Plaintiffs do not contest the issuance of the arrest warrant.

2. Search warrant

Based on the following information, the LPCSD decided to seek a search warrant of Mr. Heflin's premises:

Undersheriff Harrington interviewed Jason Egger at the Sheriff's office on April 16, 1995 at 9:00 a.m. According to the affidavit, Mr. Egger:

> advised [Undersheriff Harrington] that he arrived at Virginia's with the assailants, spent the entire time with them, was a witness to the

> assault and then left the scene with the assailants. Mr. Egger was able to identify the assailants except for two unknown male subjects who were using the names, Mike and Bob.

Hrrington Affidavit, pp. 2-3.

Mr. Egger identified the assailants as Mr. Heflin, Jack Marshall, "Rocko," identified as Lee Randall Dove, a man known to Mr. Egger as Les, identified as Lester Athen Erdman, and two men known to Mr. Egger as Mike and Bob. According to the victims and witnesses, when the assailants left Virginia's Steakhouse, their "clothing contained blood. . . from the victims." Harrington Aff., p. 3. In addition, Undersheriff Harrington stated in her affidavit that she "believes 4 that it is highly likely that receipts from Virginia's and or surrounding establishments will be found to help establish proof the assailants were actually in Virginia's Restaurant and the Vallecito Lake area." Id.

Mr. Egger stated that one of the men in Mr. Heflin's group, known only to him as "Ray," was Kristi Holland's new boyfriend. He described "Ray" as "5'10", brown hair past his shoulders with a day or two old beard and was wearing a black baseball hat with yellow lettering." Pltfs. Ex. 25, Harrington Report, p. 2. Mr. Egger stated also that after being told that the police were on their way to Virginia's Steakhouse, the Heflin group left and went to Mr. Heflin's residence. Id. at p.1.

Based on the foregoing information, the LPCSD decided to obtain a search warrant of Mr. Heflin's residence and outbuildings seeking the following property:

1. Bloody clothing, black cowboy hat, black ball cap with yellow lettering, receipts or bills from Virginia's restaurant dated 4-13-96/4-14-96. Including along with receipts from Virginia's any receipts or documents from other establishments

of the Vallecito lake area on said date.

2. Any Vehicles on the above mentioned property that may contain the above items.

3. Marlboro cigarettes (Marlboro is written in gold lettering) was a cigarette butt which was located next to the blood at the scene of the crime. None of the above victims are know the (sic) smoke cigarettes.

B. SWAT Team

1. Decision to use SWAT team

After obtaining the arrest warrant and search warrant, Sheriff Schirard, after consulting with Undersheriff Harrington and Lt. Davis, detemiined that it was necessary to employ the LPCSD's special weapons and tactics (SWAT) team to execute the warrants. According to Defendants, Sheriff Schirard's decision was premised on several factors;

1. the known violent propensities of Mr. Heflin and his friends including the report that a member of his group had displayed a gun on the evening of the assault;

2. other suspects from the steakhouse incident had been involved in violent activities, including a possible homicide;

3. information that approximately 8-10 adults who had been either involved or present at the steakhouse incident, including an ex-police officer with knowledge of police tactics, were residing at Mr. Heflin's property;

4. that evidence described in the search warrant could easily be destroyed if members of Mr. Heflin's group were given time and opportunity to

destroy or alter same;

5. use of the SWAT team would reduce the possibility for altercation among individuals present at the compound therefore minimizing the likelihood of persons being hurt;

6. outbuildings were located on the property, some of which might be occupied: and

7. it was believed that several small children may be present who could be hurt should an altercation attempt begin.

See Def. Brief, p. 3, fn. 3; Harrington Aff., p.2 ¶¶ 4-10; Def. Ex, C, Davis Deco., pp. 50-56, 59-62.

2. Deployment of SWAT Team

According to Plaintiffs, at approximately 8:30 p.m. on April 16, 1996, under the direction of Lt. Kelly Davis, the LPCSD's SWAT team executed the arrest warrant and the search warrant at the Heflin property. All of the Plaintiffs were living at the Heflin property at the time of the search.

During the execution of the search and arrest warrants, seven members of the SWAT team were dressed in green camouflage clothing including hoods over their heads with only their eyes showing. Pltf.'s Ex. 11 Davis Depo. p. 83; Pltf.'s Ex. 15, Heflin Depo. p. 134. Three other persons were dressed in the standard LPCSD deputy sheriff uniform. Ex. 11 Davis Depo., p. 83, There were no easily identifiable marks on the clothing identifying the members of the SWAT team as members of the La Plata County Sheriffs Department or any other law enforcement agency or organization. Ex. 20, T. Heflin Depo.,p. 107; Ex. 15,8. Heflin Depo., pp. 143-144.

When the SWAT team arrived at the Heflin property, Plaintiffs Randy Joe Holland (Randy), 18 years old, Marty Shane Holland, (Marty), 8 years old, and Ray Walker (Mr. Walker)

were playing basketball on the driveway of the residence. Ex. 17, R. Holland Depo., pp. 48-51. As three members of the SWAT team rapidly approached Randy, Marty and Mr. Walker, one of the SWAT team members had his weapon drawn, pointed it at the three and ordered them to lay face down on the ground. Id. Lt. Davis, present when the SWAT team encountered Randy, Marty and Mr. Walker, remained in the basketball area until the three complied with the SWAT team orders. Ex. 11, Davis Depo., pp. 19-21. Two other SWAT team members then proceeded to the Heflin residence. The SWAT officer who remained with Randy, Marty and Mr. Walker continued to keep a weapon pointed at Randy as the three remained lying face down on the pavement. Ex. 18, M. Holland Depo, pp. 19-21. According to the Plaintiffs, Marty asked one of the officers if they were going to jail and the officer replied "Probably." Ex. 17, R. Holland Depo., pp. 51-52.

Anthony Holland (Scotty), 14 years old at the time, was in the vicinity of the bunk house at the time the SWAT team was initially deployed in the area. Ex. 19, S. Holland Depo. pp. 3, 49. At approximately the same time that the SWAT team took control of Randy, Marty and Mr. Walker, three deputies ran toward the barn located to the east of the residence. Ex. 6, Downs Depo. pp. 21-23. Deputy Downs encountered Scotty and, at gunpoint, ordered him to lie on the ground. Ex. 19, pp. 50-52; Ex. 6, pp. 22-23.

Deputies Downs and Meuer proceeded to the bunkhouse while Deputy Foukas remained with Scott, who was kept in a prone position for approximately 5-10 minutes. Ex. 19, p. 63. According to Scott, the deputies never identified themselves as law enforcement personnel, Id. at pp. 53-54. However, Lt. Davis testified that as the SWAT team pulled up, he "started shouting, "Sheriffs department. Get down on the ground," Ex. 11, p. 81.

When the SWAT team, with weapons drawn, encountered Randy, Marty, Mr. Walker. and Scotty, Shelby Paige Holland (Shelby), who was four years old at the time, was outside of the residence. Ex. 11, p. 81. Shelby ran screaming into the

residence in a highly agitated state, Ex. 15, pp. 132-33, 136-37. As Shelby ran screaming into the residence, she was followed by SWAT team members. According to the Plaintiffs, the primary SWAT team member pursuing her had a laser sighted weapon, which at times was sighted on the child's back. Ex. 15, pp. 136 140; Ex, 20, T. Heflin Depo. p. 102.

When Shelby ran into the residence, Mr. Heflin's wife Tonie and Mr. Heflin were sitting at the dining room table, Kristi Dane was in the kitchen helping to prepare dinner and Tessa Sliter (a.k.a. Tessa Overdorff) and Helen Kennedy, a friend of Tessa's, were in a back bedroom. Ex, 15,pp. 132-134; Ex. 21, Sliter Depo. p.58

Within moments after Shelby was chased into the residence, several members of the SWAT team entered the home yelling and screaming. Ex, 15, pp. 137-138; Ex 20, p. 102. The parties dispute whether the SWAT team members identified themselves as being members of any law enforcement agency, see Ex. 20, p. 105; Ex. 11, p. 81. Also in dispute is whether the SWAT team knocked or otherwise announced their presence before entering the Heflin home. See Ex. 20, p. 147; Ex. 11, p. 86. According to Plaintiffs, as they entered the Heflins' home at least one of the SWAT team members was screaming "Get the fuck down." Id. at p. 147. Lt. Davis was present at the doorway of the house at the time of entrance. From there he went into the garage, and then proceeded into the living room where Tonie Heflin, Kristi Holland, and Samuel Heflin were present. Ex. 11, pp.86-88. Mr. and Mrs. Heflin were held at gunpoint until Lt. Davis gave the order for the SWAT team members to lower or holster their weapons. Ex. 11, pp. 149-50.

According to Plaintiffs, Mrs. Heflin repeatedly requested that the members of the SWAT team explain what was going on. Ex. 20, pp. 109-110. Mr. and Mrs. Heflin expressed concern that very young children were present and that it was inappropriate to be pointing guns at children. In response to these inquiries and concerns, Plaintiffs testified that several of the Defendants yelled at Mrs. Heflin to "Shut the fuck up."

Id. at pp. 109-10; Ex. 15, pp. 147-148.

Shortly after the initial entry into the house, members of the SWAT team ordered Mr. and Mrs. Heflin and K. Holland to lie on the living room floor face down. Ex. 15, pp. 146-147; Ex. 20, pp. 111-12. These Plaintiffs were kept on the floor approximately ten to fifteen minutes with firearms pointed at them while other SWAT team members completed their search of the residence, vehicles, the barn, the bunk house and the trailers located on the Heflin Property. Id.

Plaintiffs Tessa Kay Overdorff and Shelby were in the back bedroom with Helen Kennedy, a friend of Ms. Overdorff. One of the SWAT team member's entered the bedroom and pointed his gun at them, ordering Ms. Kennedy to show her hands. Ex. 21, p. 58. They were kept at gunpoint until Lt. Davis ordered them brought into the living room. Id. at pp. 5 8-62.

All of the civilians at the Heflin home were brought together in the living room. They were held there until a "wants and warrant" check was completed on each individual. Ex. 8, Sandoval Deposition, pp. 21-22, After the "wants and warrant" cheek was completed, the residents were told everyone could leave except Mr. Heflin who was placed under arrest pursuant to the arrest warrant. Ex. 11, pp. 101-02. All of the civilians except Mr. Heflin then went to the home of Mrs. Heflin's brother. Id. at p. 129.

During the time the police were searching the Heflin Property, Mrs. Heflin asked the officers several times if they had a search warrant. According to Mrs. Heflin, Lt. Davis' response was "Shut the fuck up." Ex. 20, pp. 123-22. The warrant was brought to the home and delivered by Undersheriff Harrington shortly after the search was completed.

II.

SUMMARY JUDGMENT STANDARD

The very purpose of a summary judgment motion is to assess whether trial is necessary. White v. York Int'l Corp., 45 F.3d 357, 360 (10th Cir. 1995). Fed.R.Civ.P. 56 provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The non-moving party has the burden of showing that there are issues of material fact to be determined, Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A party speking summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, interrogatories, and admissions on file together with affidavits, if any, which it believes demonstrate the absence of genuine issues for trial. Celotex, 477 U.S. at 323; Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992). Once a properly supported summary judgment motion is mad; the opposing party may not rest on the allegations contained in his complaint, but must respond with specific facts showing the existence of a genuine factual issue to be tried. Otteson v. U.S., 622 F.2d 516, 519 (10th Cir. 1980); Fed.R.Civ.P. 56(e). These specific facts may be shown "by any of the kinds of evidentiary materials listed in Rule 56(c), except the pleadings themselves." Celotex, 477 U.S. at 324.

If a reasonable juror could not return a verdict for the non-moving party, summary judgment is proper and there is no need for a trial. Celotex, 477 U.S. at 323. The operative inquiry is whether, based on all documents submitted, reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). However, summary judgment should not enter if, viewing the evidence in a light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor, a reasonable jury could return

a verdict for that party. Anderson Liberty Lobby, Inc., 477 U.S. at 252; Mares, 971 F.2d at 494. Unsupported allegations without "any significant probative evidence tending to support the complaint" are insufficient, see White at 360 (internal quote and citation omitted), as are conclusory assertions that factual disputes exist. Anderson, 477 U.S. at 247-48.

III.

Plaintiffs bring this action under 42 U.S.C. § 1983 alleging violations of their constitutional rights premised on excessive use of force. In support of their summary judgment motion, Sheriff Schirard, Undersheriff Harrington, and Lt. Davis assert the defense of qualified immunity.

A. Qualified Immunity

The affirmative defense of qualified immunity is available to all government officials, including police officers: England v. Hendricks, 880 F.2d 281 283 (10th Cir. 1989) cert. denied, 493 U.S. 1078 (1990). A § 1983 defendant enjoys qualified immunity unless he or she violated "clearly established, statutory or constitutional rights of which a reasonable person would have' known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The qualified immunity defense protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 343 (1986). If the police officer performs official acts in "good faith," she is entitled to qualified immunity. Pierson v. Ray, 386 U.S. 547, 557 (1967).

Once a defendant raises a qualified immunity defense, it is the plaintiff's burden to persuade the court that the law was clearly established. Pueblo Neighborhood Health Centers, inc. v. Losavio, 847 F.2d 642, 645 (10th Cir. 1988). In doing so, the plaintiff cannot simply identify a clearly established right in the abstract and allege that the defendant has violated it. Id. citing Anderson v. Creighton, 483 U.S, 635, 640 & n.2 (1987). Instead, the plaintiff must produce facts sufficient to

show that: 1) defendant's alleged conduct violated the law; and 2) the law was clearly established when the alleged violation occurred. Gallegos v. City and County of Denver, 984 F.2d 358, 361 (10th Cir.), cert denied, 113 Sct. 2962 (1993). If a plaintiff fails to satisfy either part of this burden, the defendant is entitled to qualified immunity. Albright v. Rodriguez, 51 F.3d 1531, 1535 (10th Cir. 1995). The plaintiff must then make a particularized showing that a reasonable officer would understand that the alleged actions violated plaintiffs constitutional rights. Hannula v. City of Lakewood, 907 F.2d 129, 130 (10th dir. 1990). Only after a plaintiff meets this initial burden does the burden shift to the defendant to show that no genuine issue of material fact exists with respect to the qualified immunity defense and that he is entitled to judgment as a matter of law. Gallegos at 361. Resolution of a qualified immunity defense poses a question of law, though I consider the plaintiffs factual allegations as true in resolving the immunity issue Mitchell v. Forsyth, 472 U.S. 511, 528-29 (1985).

1. Excessive Use of Force

It is beyond cavil that a citizen's right to be free from unreasonable searches and seizures by the police is the law of the land. This right is founded in the Fourth Amendment right not to be subjected to the use of excessive force by police officers. See Tennessee v. Garner, 471 U.S. 1, 7-8 (1985). Thus, this right is clearly established. See Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 645 (10th Cir. 1988). Moreover, it is beyond dispute that the deployment of a SWAT team arid, a fortiori, the decision to utilize a SWAT team implicates Fourth Amendment rights.

Plaintiffs claim Defendants violated their rights, pursuant to the Fourth and Fourteenth Amendments to be free from unreasonable seizures based on: 1) the Defendants decision to employ a SWAT team to execute the search warrant issued in this case; and 2) the methods employed by the SWAT team in executing the search warrant.

The decision to employ a SWAT team and the methods employed by a SWAT team are actionable under the Fourth Amendment to the United States Constitution only if the Defendants' actions are determined to be objectively unreasonable under the circumstances. See Lotta v. Keryte, 118 F.3d 693, 701 (10th Cit. 1997). In determining if the pertinent actions are objectively reasonable, the United States Supreme Court teaches that:

> the "reasonableness" of a particular use of force must be judged from the perpective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight. . . . With respect to a claim of excessive force. . . [n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers . . . violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments in circumstances that are tense, uncertain, and rapidly evolving about the amount of force that is necessary in a particular situation.

Graham v. Connor, 490 U.S. 386, 396-97 (1989).

Under the circumstances of this case, the facts relevant to the determination of whether Defendants' actions were objectively reasonable include: 1) the severity of the crime; 2) whether the situation posed an immediate threat to the safety of the officers; and 3) whether there was reason to believe the police would encounter resistance in executing the arrest and search warrants. See Latta, 118 F.3d at 701, citing Wilson v. Meeks, 52 F.3d 1547, 1553 (10th Cir. 1995). Applying these criteria here, I conclude that whether the decision to utilize the SWAT team to execute the search warrant at Mr. Heflin's property was reasonable is genuinely in dispute.

a. SWAT team decision

As to the reasonableness of Defendants' decision to employ a SWAT team, the first criterion weighs in favor of Plaintiffs' excessive force claims. No party involved in the brawl at Virginia's Steakhouse was charged with a felony. Mr. Heflin was charged with third-degree assault, a class I misdemeanor and reckless endangerment, a class 3 misdemeanor. As to the second and third Graham criteria, there is considerable dispute. For example, based on Undersheriff Harrington's affidavit and the testimony and reports of Defendants arid other LPCSD staff, the deployment decision was based on, among other factors, "the known violent propensities of Sammy Heflin and his friends[,] including the fact that a member of his group had displayed a gun on the evening of the assault and as other suspects from the steakhouse incident had been involved in violent activities, including a possible homicide." Def. Brief, p. 3.

In contrast, Plaintiffs present evidence that there was no indication that Mr. Heflin, who had no prior criminal record, would resist either arrest or search of his property. In addition, either before the decision was made to use the SWAT team or before the deployment occurred, the LPCSD was informed that Randall Dove and Lester Erdman, the persons alleged to have been involved in violent activities, including a possible homicide, had been arrested and taken into custody by LPCSD deputies. See Stipulation, ¶ 6.

According to Defendants, the decision to utilize the SWAT team to execute the search warrant was made mainly because the evidence described in the search warrant could easily be destroyed if members of Mr. Heflin's group were given time and opportunity td destroy or alter the designated items. Plaintiffs present evidence that an LPCSD policy provides that the LPCSD "would use a dynamic entry only when it was deemed that serious bodily injury would occur to persons if a dynamic entry was not used. Dynamic entry would not (sic) be used to simply preserve evidence that might be destroyed if a slower form of entry is made." See Ex.

23, Sgt. Bender memo, p. 1. In addition, the evidence sought, including clothing, a cowboy hat, ball cap, cigarette packages, and receipts and bills, is not susceptible to quick destruction, Unlike drugs such as heroin or cocaine, these items could not be flushed down a toilet or disposed of rapidly.

Viewing the evidence in the light most favorable to Plaintiffs I conclude that there is genuine dispute whether the decision to deploy the SWAT team was objectively reasonable. Consequently, I cannot say, as a matter of law, that the decision to use SWAT force was objectively reasonable. I will deny Defendants' summary judgment motion to the extent it is premised on the decision to use the SWAT team to execute the 'arrest and search warrants.

b. SWAT team methods

Assuming that the decision to deploy the SWAT team was objectively reasonable, Plaintiffs contend that the SWAT team used excessive force in executing the search warrant at the Heflin property.

"[R]easonableness depends on not only when a Seizure is made, but also how it is carried out." United States v. Place, 462 U.S. 696 (1983) citing United States v. Ortiz, 422 U.S. 891, 895, 45 L. Ed. 2d 623 (1975); Terry v. Ohio, 392 U.S. 1, 28-29 (1968).

Plaintiffs present evidence that during the execution of the search warrant: 1) guns were pointed at all of the Plaintiffs , including children as young as 4 years of age; 2) the Plaintiffs were forced at gunpoint to tie face down by the SWAT team for periods up to 10-15 minutes; 3) the officers used profane and intimidating language; and 4) the SWAT team entered without knocking and announcing their presence.

1. Detention

Once a valid decision is made to use a SWAT team, during the SWAT team's entry, it is "entirely reasonable to order

[persons encountered) to 'get down' until the situation [is] under control." Baker v. Monroe Township, 50 F.3d 1186, 1191 (3rd Cir. 1995). Under Michigan v. Summers, 452 U.S. 692 (1981), during execution of a search warrant, police can detain the occupant of the house they have a warrant to search. Moreover, detention is reasonable to protect the police, to prevent flight, and generally to avoid dangerous confusion. Baker, 50 F.3d at 1191. "The risk of harm to both the poli9e and the occupants is minimized if the officers routinely exercise unquestioned command of the situation," Summers, 452 U.S. at 702-02. Here, the need to protect the persons from any altercations and the need to clear the area of approach for the SWAT team to operate efficiently made it reasonable to order the occupants down on the ground or floor for a. short period of time. See Baker.

There is no per se rule about the length of time a person may be detained before the detention becomes a full-scale arrest for which probable cause must exist. Instead, a court must examine the reasonableness of the detention, particularly whether the police were diligent in accomplishing the purpose of the detention as rapidly as possible. Id. at 1192. In this case, it is undisputed that the Heflin property covered a large area containing the main house and outbuildings, including a barn, bunk house, and trailers. Also, the police encountered several persons on the property. According to the Defendants, it took no more than five minutes until all the persons were gathered in the living room. Ex, 11, p. 102. According to the Plaintiffs, they were kept on the ground or floor no more than 15 minutes. See Resp. Brief, p. 15, ¶ 27; Ex. 20, pp. 111-12. When the Plaintiffs were gathered in the living room, Lt. Davis ordered the police to holster their weapons. Defendants state that they were on the property approximately 30 minutes. Ex. 11, p. 102. Under these circumstances, assuming the use of the SWAT team was reasonable, I conclude that, as a matter of law, there is no genuine dispute that ordering Plaintiffs to the ground or floor and detaining them for a total of 30 minute was objectively reasonable.

2. Weapons

It is well established that the right to arrest an individual carries with it the right to use some physical coercion to effect the arrest. Thompson v. City of Lawrence, Kansas, 58 F.3d 1511, 1516(10th Cir. 1995); Graham v. Connor, 490 U.S. 386, 396 (1989). It is not unreasonable for officers to carry weapons or to take control of a situation by displaying their weapons.' See Thompson, 58 P.3d at 1516. However, the undisputed testimony that the SWAT team pointed weapons at young children during the entry raises a genuine dispute whether the force used by the officers was objectively reasonable.

3. Use of profane and intimidating language

Defendants do not dispute Plaintiffs' testimony that during the execution of the SWAT team, some officers used profane language and yelled at them. Nor is there any evidence or allegation that any officer laid hands on any Plaintiff. It is apparent that the use of a SWAT team under any circumstances is shocking and traumatic to the civilians involved. However, I am unaware of any authority that rough language can form the basis for an excessive force claim. Indeed, "'[n]ot every push or shove is excessive." Calamia v. City of New York, 879 P.26 1025, 1034 (26 Cir.1989) quoting Graham v. Connor, 490 U.S. 386 (1989).

4. Knock and announce

"[R]easonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering." Wilson v. Arkansas, 514 U.S. 927, 931 (1995). Where, as here, the parties present conflicting testimony whether the police knocked and announced their presence and authority before entering Mr. Heflin's homes Defendants arc not entitled to summary judgment.

Based on the foregoing, I deny Defendants' summary judgment motion. However, the jury's determination of the objective reasonableness of the deployment of the SWAT team will be limited to consideration of: 1) the use of weapons in connection with the minor Plaintiffs; and. 2) whether the SWAT team "knocked and announced."

B. Qualified Immunity inquiry

I next evaluate the qualified immunity defense asserted by the Defendants in light of my determination that there are material factual disputes whether the decision to employ a SWAT team was objectively reasonable and the methods used by the SWAT were objectively
reasonable.

Under the qualified immunity inquiry, I must next determine whether a reasonable officer could have believed that the conduct in question did not violate clearly established law. In general, even though conduct is "unreasonable" under the Fourth Amendment, because of "the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment," Anderson v. Creighton, 483 U.S. 635, 644 (1987), such conduct may nevertheless be objectively reasonable for purposes of qualified immunity. Dixon v. Richer, 922 F.2d 1456, 1463 (10th Cir. 1991). 1991).

In excessive force claims asserted under the Fourth Amendment, the qualified immunity question is usually answered in the Fourth Amendment inquiry. This is because, in the excessive force context, the Fourth Amendment inquiry asks directly whether the police officer reasonably could have believed that the force was necessary under the circumstances. Id.

As to individual liability, the relevant inquiry is whether Defendants personally participated in any violations of Plaintiffs constitutional rights and, if so, whether the officer's conduct was reasonable. See Cortese v. Black, 838 F.Supp. 485, 496 (D.Colo.1993) ("personal participation is an essential

allegation in a § 1983 action). A supervisor is not liable under § 1983 unless an "affirmative link" exists between the alleged constitutional deprivation and either the supervisor's personal participation, his exercise of control or direction, or his failure to supervise. Butler v, City of Norman, 992 P.26 1053, 1055 (10th Cir. 1991).

1. Sheriff Schirard

It is undisputed that Sheriff Schirard was the final decision maker in the decision to utilize the SWAT team to execute the search warrant at Mr. Heflin's property. It is also undisputed that when the decision to deploy the SWAT team was made: 1) he was policy maker for the LPCSD; and 2) there existed the LPCSD policy that "dynamic entry would not (sic) used to simply preserve evidence that might be destroyed if a slower form of entry is made." See Ex. 23, p. 1.

Under these circumstances, Sheriff Schirard's decision to use the SWAT team provides the "affirmative link" between his "personal participation" in the alleged deprivation of Plaintiffs' constitutional rights. Therefore, the Sheriff is not entitled to qualified immunity. See Butler, 992 F.2d at 1055.

2. Undersheriff Harrington

Defendants agree that Undersheriff Harrington is a decision maker but that Sheriff Schirard made the decision to employ the SWAT team. However, Plaintiffs' argue that Undersheriff Harrington violated their constitutional rights through her participation in the decision to utilize the SWAT team. Like Sheriff Schirard, the Undersheriff is charged with knowledge of the LPCSD policies. Thus, like Sheriff Schirard, Undersheriff Harrington is not entitled to qualified immunity.

In addition, Plaintiffs present LPCSD Investigator Cheverie's undisputed testimony that when Undersheriff Harrington informed him she was going to obtain an arrest warrant for Mr. Heflin, he stated, "Well, fine. I'll just get someone in

uniform, and we'll go out and pick him up." Ex. 13, p. 16. According to Mr. Cheverie, Undersheriff Harrington responded, "No, I don't want you to go pick him up. We're going to use a SWAT team to go get the piece of shit. He can't do that in my county." Id. at pp. 1 7, 20-21.

It is true that the issue of "good faith" is not relevant to the determination of "objective reasonableness" in assessing excessive force claims. However, an officer's objective "good faith" belief that the force used did not violate the Fourth Amendment may be relevant to the availability of the qualified immunity defense. See Anderson V. Creighton, 483 U.S. 635 (1987).

3. Lieutenant Davis

Defendants agree that Lt. Davis is a decision maker and that Sheriff Schirard made the decision to employ the SWAT team. However, Plaintiffs' argue that Lt. Davis violated their constitutional rights through his participation in the decision to utilize the SWAT team.

Like Sheriff Schirard, as a decision maker and tactical commander of the SWAT team, Lt. Davis is charged with knowledge of the LPCSD policies. Thus, like Sheriff Schirard and Undersheriff Hanington, Lt. Davis is not entitled to qualified immunity.

As to the methods used by the SWAT team, as supervisor of the SWAT team, at a minimum, Plaintiffs must show an underlying constitutional violation on the part of a subordinate to establish Lt. Davis' supervisory liability. See Butler V. City of Norman, 992 F.2d 1053, 1055 (10th Cir. 1993). 1 have denied summary judgment as to Plaintiffs' excessive force claim concerning "knock and announce" and the SWAT team's use of weapons with respect to the minor Plaintiffs. Thus, the question whether Lt. Davis is entitled to qualified immunity as to these issues must wait until trial.

4. LPCSD

To establish the LPCSD's liability, Plaintiffs must prove: 1) the existence of a municipal policy or custom, and 2) a direct causal link between the policy or custom and the injury alleged. See Minion v. City of Elwood, Kansas, 997 F.2d 774, 779 (10th Cir. 1993).

Plaintiffs have not satisfied their summary judgment burden to show the existence of a policy or custom of either unlawfully ordering the execution of search and arrest warrants through use of a SWAT team or of allowing SWAT team members to violate citizens' constitutional rights while executing the warrants. Indeed, the evidence is to the contrary. The policy at issue in this case limits the use of the SWAT team.

In addition, Plaintiffs allege no facts to satisfy the Tenth Circuit's three part test for establishing municipal liability under § 1983. Plaintiffs must show:.

1. the existence of a continuing, persistent or widespread practice of unconstitutional misconduct by the [municipality's] employees;

2. deliberate indifference to or tacit approval of such misconduct by the [municipality's] policymaking officials. . . after notice to the officials of that particular misconduct; and

3. the plaintiff was injured by the unconstitutional acts pursuant to the [municipality's] custom and the custom was the moving force behind the unconstitutional acts."

Gates v. Unified School Dist., 996 F.2d 1035, 1041 (10th Cir. 1993).

Plaintiffs do not allege any another instance where the LPCSD or its employees violated constitutional rights under similar circumstances. Therefore, I dismiss the claims against the LPCSD as a matter of jaw.

IV.

Conclusion

The issues remaining for trial are:

1. Whether the decision to deploy the SWAT team to execute the search warrant of Plaintiff S. Heflin's property violated the Plaintiffs' rights to be free from unreasonable searches and seizures?

2. Whether detaining minors at gunpoint and pointing weapons at minors constitutes excessive force in violation of the Plaintiffs' rights to be free from unreasonable searches and seizures?

3. Whether, if proven at trial, the SWAT team's failure to "knock and announce" its entry into Mr. Heflin's house constitutes excessive force in violation of the Plaintiffs' rights to be free from unreasonable searches and seizures?

Accordingly, IT IS ORDERED that:

1. Defendants' motion for summary judgment is DENIED as to Plaintiffs' claims for violation of 42 § 1983 based on excessive force to the extent the motion is based on:

a. the decision to deploy the SWAT team;

b. allegations that the SWAT team used weapons against minor children; and

c. allegations that the SWAT team failed to "knock

and announce" its entry.

The motion is GRANTED with respect to Plaintiffs' claims based on:

d. the SWAT team's "get down" orders;

e. the SWAT team's detention of Plaintiffs;

f. the SWAT team's use of profane and intimidating language; and

2. Defendant LaPlata County Sheriff's Department's motion for summary judgment is GRANTED and this action is DISMISSED as to that Defendant;

3. the remaining Defendant's motion for summary judgment based on qualified immunity is DENIED.

Dated: August
1999 in Denver, Colorado.

BY THE COURT:
LEWIS T. BABCOCK, JUDGE

Civil Action No. 98-B-229

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

SHELBY PAIGE HOLLAND, a minor, by and through her next friend and parent Tessa Kay Overdorff; MARTY SHANE HOLLAND, a minor, by and through his next friend and parent Tessa Kay Overdorff; ANTHONY SCOTT "SCOTTY" HOLLAND, a minor, by and through his next friend and parent, Tonie Pauline Heflin; KRISTY DENISE HOLLAND DANE; RANDY JOE HOLLAND; TESSA KAY OVERDORFF; TONIE PAULINE HEFLIN; SAMUEL ALLEN HEFLIN, Plaintiffs-Appellees,

v.

ROBIN S. HARRINGTON, individually, and in her official capacity as Undersheriff of La Plata County, Colorado; DUKE SCHIRARD, individually, and in his official capacity as the Sheriff of La Plata County, Colorado; KELLY DAVIS, individually, and in his official capacity as a deputy sheriff of the La Plata County Sheriff's Department, Defendants-Appellants.

Lewis T. Babcock, Judge

Filed February 4, 2000

ORDER

Pending is Plaintiffs' motion to amend order seeking to reinstate Plaintiffs' claim two against the La Plata County Sheriffs Department (the Sheriff's Department) under the theory of municipal liability. In an August 9, 1999 minute order, I granted Defendants to and including August 20, 1999 to respond. Defendants filed no response. After consideration of Plaintiffs' motion, I reinstate Plaintiffs' claim two Against the Sheriff's Department.

I interpret Plaintiffs' motion as a Federal Rule of Civil Procedure 60(b)(l) motion for relief from judgment or order. Relief under Rule 60(b) is discretionary and is warranted only in exceptional circumstances. Van Skiver v. U.S., 952 F.2d 1241, 1243 (10th Cir. 1991). Rule 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (I) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud. misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

On August 3, 1999 I issued an Order granting, Defendants' summary judgment motion on claim two as to La Plata County Sheriffs Department (Sheriff's Department) based on a finding there was no municipal liability. See Order, p. 21. Plaintiff states to the court that municipal liability may be premised upon a single decision by a municipal official with final policy making authority. See Pembaur v. Cincinnati, 475 U.S. 112 (198K). I agree.

In this case, it is undisputed that Sheriff Schirard, the elected county officer, § 30-10-50 1, C.R.S., is the ultimate decisionmaker for the Sheriff's Department and made the final decision to deploy the SWAT team. See Order, pp. 18-19. Having determined that there is a genuine dispute as to the reasonableness of the decision to deploy the SWAT team, the

Court erred in granting the Sheriff's Department motion for summary judgment.

Accordingly, IT IS ORDERED that Plaintiffs' claim two against the Sheriff's Department of La Plata County for supervisory and municipal liability team pursuant to 42 U.S.C. § 1983. First, Fourth and Fourteenth Amendments to the United States Constitution is REINSTATED as to as to Sheriff Schirard's decision to deploy the SWAT team.

Dated: February 4, 2000 in Denver, Colorado.

BY THE COURT:

LEWIS T. BABCOCK; JUDGE

No. 99-1373

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SHELBY PAIGE HOLLAND, a minor, by and through her next friend and parent Tessa Kay Overdorff; MARTY SHANE HOLLAND, a minor, by and through his next friend and parent Tessa Kay Overdorff; ANTHONY SCOTT "SCOTTY" HOLLAND, a minor, by and through his next friend and parent, Tonie Pauline Heflin; KRISTY DENISE HOLLAND DANE; RANDY JOE HOLLAND; TESSA KAY OVERDORFF; TONIE PAULINE HEFLIN; SAMUEL ALLEN HEFLIN, Plaintiffs-Appellees,

v.

ROBIN S. HARRINGTON, individually, and in her official capacity as Undersheriff of La Plata County, Colorado; DUKE SCHIRARD, individually, and in his official capacity as the Sheriff of La Plata County, Colorado; KELLY DAVIS, individually, and in his official capacity as a deputy sheriff of the La Plata County Sheriff's Department, Defendants-Appellants.

ORDER

Filed November 28, 2001

Before HENRY and BRISCOE, Circuit Judges, and JENKINS, Senior District Judge.

Appellant Kelly Davis' and Appellees' respective petitions for rehearing are denied.

The petitions for rehearing en banc were transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App.P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, those petitions are also denied.

Entered for the Court

PATRICK FISHER, Clerk of Court
Deputy Clerk
by:

*The Honorable Bruce S. Jenkins, United States Senior District Judge for the District of Utah, sitting by designation.